DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-497
Title: Rent-A-Center, West, Inc., Petitioner
v.
Antonio Jackson
Docketed: October 27, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-16164)
Decision Date: September 9, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 23 2009	Petition for a writ of certiorari filed. (Response due November 27, 2009)
Nov 4 2009	Waiver of right of respondent Antonio Jackson to respond filed.
Nov 4 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 6 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 17 2009	DISTRIBUTED for Conference of December 4, 2009.
Nov 20 2009	Brief amicus curiae of Pacific Legal Foundation filed.
Nov 24 2009	Response Requested . (Due December 24, 2009)
Dec 17 2009	Brief of respondent Antonio Jackson in opposition filed.
Dec 30 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 7 2010	Reply of petitioner Rent-A-Center, West, Inc. filed. (Distributed)
Jan 15 2010	Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 25, 2010. The brief of respondent is to be filed on or before Thursday, March 25, 2010. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 2 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Feb 4 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Feb 16 2010	SET FOR ARGUMENT ON Monday, April 26, 2010.
Feb 25 2010	Brief of petitioner Rent-A-Center, West, Inc. filed.
Feb 25 2010	Joint appendix filed. (Statement of costs received)
Mar 3 2010	Brief amicus curiae of Pacific Legal Foundation filed.
Mar 4 2010	Brief amicus curiae of Equal Employment Advisory Council filed.
Mar 4 2010	Brief amicus curiae of Chamber of Commerce of the United States of America

filed.

Mar 5 2010 Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Mar 18 2010 CIRCULATED.

Mar 24 2010 Brief of respondent Antonio Jackson filed. (Distributed)

Mar 31 2010 Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)

Mar 31 2010 Brief amici curiae of Professional Arbitrators and Arbitration Scholars filed. (Distributed)

Mar 31 2010 Brief amicus curiae of National Association of Consumer Advocates filed. (Distributed)

Mar 31 2010 Brief amici curiae of National Consumer Law Center, et al. filed. (Distributed)

Mar 31 2010 Brief amici curiae of Service Employees International Union, et al. filed. (Distributed)

Mar 31 2010 Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)

Mar 31 2010 Brief amici curiae of American Association for Justice and AARP filed. (Distributed)

Apr 16 2010 Reply of petitioner Rent-A-Center, West, Inc. filed. (Distributed)

Apr 26 2010 Argued. For petitioner: Robert F. Friedman, Dallas, Tex. For respondent: Ian E. Silverberg, Reno, Nev.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

RULE 14.1(b) STATEMENT—PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Antonio Jackson, Plaintiff-Appellant, Respondent on Review.
2. Rent-A-Center, West, Inc., Defendant-Appellee, Petitioner on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Rent-A-Center, West, Inc. is a wholly owned subsidiary of Rent-A-Center, East, Inc., which is a wholly owned subsidiary of Rent-A-Center, Inc., a publicly held company. There are no other parent or publicly held corporations owning 10% or more of the stock of Petitioner Rent-A-Center, West, Inc.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Rent-A-Center, West, Inc. ("Petitioner" or "RAC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting RAC's Motion to Dismiss Proceedings and Compel Arbitration on the grounds that the parties' arbitration agreement clearly and unmistakably vested the arbitrator with the authority to decide the issue of unconscionability is unpublished. (App., *infra* 1a-6a). The Ninth Circuit Court of Appeals, in a published opinion reported at __ F.3d ___ , 2009 U.S. App. LEXIS 20133, 107 Fair Empl. Prac. Cas. (BNA) 254

(9th Cir. Sep. 9, 2009), affirmed in part, reversed in part, and remanded to the district court to determine whether the arbitration agreement was unconscionable. (App., *infra* 7a-20a). Circuit Judge Cynthia Holcomb Hall dissented, stating that the "question of the arbitration agreement's validity should have gone to the arbitrator, as the parties 'clearly and unmistakably provide[d]' in their agreement." (App., *infra* 23a).

JURISDICTION

The Ninth Circuit's judgment was entered on September 9, 2009. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (granting certiorari after Court of Appeals affirmed in part and reversed in part order of district court compelling arbitration and remanded to district court for further proceedings).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA are set forth at App., *infra* 35a-36a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unmistakable terms of an arbitration agreement governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The arbitration agreement expressly states that "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this

Agreement is void or voidable." (App., *infra* 30a). Despite the parties' clear and unmistakable agreement that the arbitrator possessed exclusive authority to decide a claim of unenforceability due to alleged unconscionability, the Ninth Circuit held that, as a matter of law, the unconscionability determination is exclusively for the district court and can never lie within the province of an arbitrator. In this regard, the Ninth Circuit could not have been clearer: "This rule applies even where the agreement's express terms delegate that determination to the arbitrator." (App., *infra* 18a).

The Ninth Circuit's opinion is in direct conflict with opinions of the First, Eighth and Eleventh Circuit Courts of Appeals which permit arbitrators to determine unconscionability when the parties have so agreed and is also at variance with several of this Court's cases holding that clear and unmistakable agreements authorizing arbitrators to decide questions of arbitrability are fully enforceable under the FAA.

STATUTORY FRAMEWORK

Congress enacted the FAA for the central purpose of ensuring that private agreements to arbitrate are enforced according to their terms. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of any contract "evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Parties to arbitration agreements under the FAA are therefore "generally free to structure their arbitration agreements as they see fit" and can

"specify by contract the rules under which [the] arbitration will be conducted." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). As a result, this Court has held that arbitration agreements which clearly and unmistakably evince the parties' intent to assign the determination of arbitrability to the arbitrator and not the courts are fully enforceable. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (question of who has the primary power to decide arbitrability "turns upon what the parties agreed about *that* matter" (emphasis in original)); *AT&T Technologies Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability).

FACTUAL BACKGROUND

The relevant facts of this case are uncomplicated and not subject to dispute. On or about February 24, 2003, Respondent, Antonio Jackson ("Jackson") and RAC entered into a Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement") arising out of the employment relationship between Jackson and RAC. (App., *infra* 25a-34a). Under the Arbitration Agreement, Jackson and RAC agreed to the resolution of all claims that each might have against the other relating to Jackson's employment or the termination of his employment. (App., *infra* 25a-26a). The Arbitration Agreement clearly stated the "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." (App., *infra* 30a). In signing the Arbitration Agreement,

Jackson acknowledged that he had carefully read it, understood its terms, did not rely upon any representations other than those contained therein and was given the opportunity to discuss its terms with private legal counsel. (App., *infra* 32a-34a).

Despite having executed the Arbitration Agreement, Jackson filed a complaint in the United States District Court for the District of Nevada alleging race discrimination and retaliation under 42 U.S.C. § 1981. (App., *infra* 3a, 8a). The district court possessed federal question jurisdiction under 28 U.S.C. § 1331. RAC moved to dismiss Jackson's complaint and to compel arbitration. (App., *infra* 1a).[1] In response, Jackson contended that the Arbitration Agreement that he had signed was procedurally and substantively unconscionable and was hence "invalid" and "unenforceable." (Ninth Circuit Excerpt of Record, p. 50). He contended that the Arbitration Agreement was procedurally unconscionable only because it was "presented to him as a non-negotiable condition of his employment." (App., *infra* 9a). He contended that the Arbitration Agreement was substantively unconscionable because it was allegedly one-sided, placed limits on discovery and contained a provision permitting sharing of the costs of the arbitration procedure if allowed by state law. *Id.*

In support of its motion to compel, RAC's primary argument was that the parties expressly agreed in the Arbitration Agreement that "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcea-

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[1] In the alternative, RAC sought an order staying the district court proceeding while compelling arbitration. (Ninth Circuit Excerpt of Record, pp. 32-33).

bility or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* In the alternative, RAC contended that the Agreement was neither procedurally nor substantively unconscionable. (Ninth Circuit Excerpt of Record, pp. 32-33).

The district court granted RAC's motion on June 7, 2007, compelling arbitration and dismissing Jackson's lawsuit. It found that the Arbitration Agreement "clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." (App., *infra* 4a). The district court held that "[a]s such, the question of arbitrability is a question for the arbitrator." *Id.*

The district court further ruled that even if it were to determine the issue of unconscionability, "there appears to be a lack of evidence to suggest an unconscionable agreement." (App., *infra* 5a). In so ruling, the district court expressly stated that the cost-sharing provision of the Agreement was not substantively unconscionable. *Id.* However, the district court did not specifically discuss Jackson's two other claims of substantive unconscionability. *Id.* Because Nevada law requires both procedural and substantive unconscionability to render an arbitration agreement unenforceable and because the district court did not identify any substantive unconscionability, the court did not reach the issue of procedural unconscionability. (App., *infra* 5a-6a).

Jackson appealed.[2] In a 2-1 decision, the Ninth Circuit Court of Appeals affirmed in part, reversed in

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[2] The Ninth Circuit possessed appellate jurisdiction under 28 U.S.C. § 1291.

part, and remanded to the district court. (App., *infra* 20a). The Ninth Circuit acknowledged that it was undisputed that the Agreement clearly and unmistakably assigned the question of contract validity to the arbitrator. (App., *infra* 13a). However, in reversing the order to arbitrate, the court held that the *mere allegation* that an arbitration agreement is unconscionable required the district court, and not the arbitrator, to determine that issue, notwithstanding the parties' express agreement to the contrary. (App., *infra* 15a). The court affirmed the district court's finding that the Arbitration Agreement's cost provision was not substantively unconscionable but remanded for the district court to rule on Jackson's two other substantive unconscionability claims as well as his claim of procedural unconscionability. (App., *infra* 18a-20a).

Specifically, the Ninth Circuit stated, contrary to decisions of this Court that arbitration agreements giving the arbitrator power to decide arbitrability are fully enforceable, as follows:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator.* (App., *infra* 17a-18a; emphasis added).

Judge Hall dissented, stating that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even*

when the contract language 'clearly and unmistakably' chooses a different forum for that question." (App., *infra* 22a; emphasis in original). Judge Hall observed that the ruling conflicted with that of the First Circuit in *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009), and was also contrary to the Supreme Court's decisions in *First Options* and *AT&T Technologies*, making it "difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'" (App., *infra* 22a). While noting that "everyone agrees that unconscionable arbitration agreements should not be enforced," Judge Hall stated, "[a]t issue here is *who* should decide if the agreement is unconscionable when the parties' agreement gives the question to the arbitrator." (App., *infra* 24a; emphasis in original).

No one can, or does, contest that the language of the arbitration agreement in this case clearly and unmistakably provides the arbitrator with exclusive authority to decide all issues regarding the interpretation, applicability, enforceability or formation of the arbitration agreement, including issues of unconscionability. With no relevant factual disputes and with an unequivocal holding by the Ninth Circuit that the clear and unmistakable contractual provision at issue here will not be enforced, this case presents an excellent vehicle to decide the important issue whether the FAA prohibits an arbitrator from deciding unconscionability even if the parties' agreement expressly requires the arbitrator to do so.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts with this Court's Cases.

The Ninth Circuit has established in this case a blanket rule that only courts possess the authority under the FAA to determine whether an arbitration agreement is unconscionable. According to the Ninth Circuit, the parties' clear and unmistakable agreement to assign contract validity determinations to the arbitrator will be disregarded if one of the parties resists arbitration by merely claiming that the agreement is invalid and unenforceable because it is unconscionable. This blanket rule undermines the paramount federal policy in favor of the enforcement of arbitration agreements as written and is contrary to this Court's holdings. The Ninth Circuit's ruling will likely have profound effects throughout the country as many arbitration agreements, including those that incorporate the rules of the American Arbitration Association ("AAA") and most other major arbitration services, require that issues relating to the arbitrator's jurisdiction, which include issues regarding enforceability and thus procedural and substantive unconscionability, are to be decided by the arbitrator.[3]

A. Unconscionability Is a Gateway Issue.

Normally, in deciding whether to compel arbitration, the trial court is charged with determining two "gateway" issues: (1) whether there is a valid and binding agreement between the parties to arbitrate and (2) whether that agreement covers the particular

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[3] Relevant portions of the commercial and employment arbitration rules of AAA and JAMS are reproduced at App., *infra* 37a-38a.

dispute between them. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).[4] "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Id.* Put another way, the broad question of "whether the parties have a valid arbitration agreement at all" is a classic gateway issue normally to be decided by the court. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

While this Court has not specifically addressed whether unconscionability is a "gateway" issue, the Court's opinions in *Howsam* and *Bazzle* make clear that the defense of unconscionability, bearing as it does on whether the arbitration agreement is valid and enforceable, must be included as such. The district court and the Ninth Circuit therefore properly treated Jackson's claim of unconscionability as a gateway issue, the resolution of which would determine the validity and enforceability of the agreement to arbitrate the underlying employment dispute. (App., *infra* 4a, 13a-15a).

B. There Is an Exception to the General Rule Regarding Gateway Issues When the Parties Clearly and Unmistakably Agree They Are for the Arbitrator.

This Court has recognized on several occasions that the parties to an arbitration agreement may agree that "gateway" issues normally decided by the trial court can instead be delegated to the arbitrator.

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[4] This case involves the first "gateway" issue only, as it is beyond dispute that the arbitration provision covers the employment-related claims being advanced by Jackson in this case. (App., infra 2a).

Under the FAA, parties may modify generally applicable rules for interpreting and enforcing arbitration agreements. In *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404 (2008), the Court stated, "[Petitioner] is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, *which issues are arbitrable*, along with procedure and choice of substantive law." (Emphasis added.) As explained in *Volt*: "Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 (citations omitted).

Accordingly, the general rule that courts, not arbitrators, decide the gateway issues may be superseded when "the parties clearly and unmistakably provide otherwise." *AT&T Technologies*, 475 U.S. at 649; *accord First Options*, 514 U.S. at 943 ("The question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."). That the parties here executed an arbitration agreement that "clearly and unmistakably" gave the arbitrator the authority to decide all gateway issues, including the issue of unconscionability, is undisputed, as the Ninth Circuit acknowledged: "In contrast to *First Options*, we are not presented with 'silence or ambiguity on the "who should decide the arbitrability point."' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator." (App., *infra* 13a).

C. The Ninth Circuit's Departure from Supreme Court Precedent.

Despite this Court's holdings in *AT&T Technologies* and *First Options* that parties are free to have "gateway" issues decided by the arbitrator and not the trial court, and *Hall Street's* recent reaffirmation that the parties may agree on "which issues are arbitrable," the Ninth Circuit refused to enforce the parties' clear and unmistakable delegation of the contract enforceability issue to the arbitrator. The Ninth Circuit held that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." (App., *infra* 15a). The court further stated:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. This rule applies even where the agreement's express terms delegate that determination to the arbitrator. We hold that where, as here, an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter. (App., *infra* 18a).

Thus, the Ninth Circuit created, without support, a new "exception to the exception" that swallows most of the exception whole. Under the Ninth Circuit's unique formulation, courts presumptively decide "gateway" issues (the general rule), but parties may

agree "clearly and unmistakably" to delegate such issues to the arbitrator (the *AT&T/First Options* exception to the general rule) unless, as the Ninth Circuit now holds, the "gateway" issue delegated is "the question of the arbitration agreement's validity * * *." (App., *infra* 18a). Dissenting Judge Hall thus legitimately questioned what is left of the *AT&T/First Options* exception in the wake of the majority's decision, since "[t]he exception begins to look very much like the general rule in that courts will be deciding the question of agreement validity under both scenarios, regardless of what the agreement's language might say about the chosen forum for that question." (App., *infra* 22a).

The Ninth Circuit purported to justify its decision to disregard the clear and unmistakable language of the arbitration agreement by its reliance on *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). (App., *infra* 11a-12a). In *Buckeye*, this Court held that when a party challenges the validity of a contract but not specifically its arbitration provisions, the challenge to the contract's validity should be considered by an arbitrator, not a court. *Id.* at 446. The flip side of this rule is that when a party challenges the validity of the arbitration provision itself, apart from the validity of any "container contract," a court normally decides the threshold question of enforceability of the arbitration provision. *Id. See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in the inducement of the contract as a whole was to be decided by the arbitrator but fraud in the inducement of the arbitration provision itself was for

the court).[5] However, neither *Buckeye* nor *Prima Paint* addressed the issue posed in this case, whether issues regarding the validity of the arbitration agreement can be appropriately delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. The Ninth Circuit's reliance on *Buckeye* stretches the holding in that case beyond its proper limits.[6]

The Ninth Circuit has thus adopted, without support, a blanket rule that a claim that an arbitration agreement is invalid because it is unconscionable

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[5] Unlike *Prima Paint*, this case does not involve any issue regarding the "making of the agreement for arbitration" within the meaning of 9 U.S.C. § 4. *See Prima Paint*, 388 U.S. at 403-04 (allegation of fraud in the inducement goes to the "making" of the agreement). Here, Jackson does not allege fraud in the inducement, nor does he contest the fact that he signed the agreement. He merely alleges that RAC had greater bargaining power than he did and that certain provisions of the Arbitration Agreement were unfair to him. These allegations do not go to the "making" of the Arbitration Agreement. *See Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (allegations of procedural and substantive unconscionability are not the equivalent of questioning the "making" of the agreement to arbitrate); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 492 n.3 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (allegation that arbitration agreement was contract of adhesion did not concern the "making" of the agreement).

[6] The Ninth Circuit also cited to several of its own cases applying *Buckeye*. (App., *infra* 11a). But those cases, unlike this case, do not involve clear and unmistakable contract language giving the arbitrator authority to decide the validity and enforceability of the arbitration agreement. *See, e.g., Davis v. O'Melveney & Myers*, 485 F.3d 1066, 1070-72 (9th Cir. 2007) (arbitration agreement did not give arbitrator authority to decide arbitrability and no party questioned that the determination of validity of the agreement was therefore for the court).

cannot under any circumstances be decided by an arbitrator. This blanket rule is contrary to decisions of this Court holding that the default rule normally requiring "gateway" issues to be decided by the trial court is trumped by a clear and unmistakable agreement that such issues are to be decided by the arbitrator. The Ninth Circuit's decision to create out of "whole cloth" an exception to this Court's holdings for issues of contract validity if there is merely a *claim* of unconscionability creates an important legal issue worthy of this Court's review.

II. There Is a Split Between the Courts of Appeals Over Whether an Arbitrator May Determine Issues of Contract Validity Where the Parties Clearly and Unmistakably So Provide.

The Ninth Circuit's holding in this case that the defense of unconscionability must always be decided by the trial court even when the parties' arbitration agreement clearly and unmistakably states otherwise, is in direct conflict with decisions from the First, Eighth and Eleventh Circuit Courts of Appeals and is inconsistent with the decisions of other courts that fully enforce agreements vesting arbitrators with the authority to decide issues of contract validity. This split between the circuits is deepening and should be resolved by this Court.

A. The Ninth Circuit's Approach Conflicts With the Eleventh and Eighth Circuits' Approaches.

The Ninth Circuit's holding that unconscionability is always for the court and never for the arbitrator is contrary to the Eleventh Circuit's holding in *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432

F.3d 1327 (11th Cir. 2005). In *Terminix*, the party opposing arbitration under the FAA contended that certain restrictions on statutory remedies contained in the arbitration agreement rendered the arbitration agreement invalid and unenforceable. *Id.* at 1329. The Eleventh Circuit stated that such a challenge would ordinarily be decided by the trial court which must "determine whether those remedial restrictions are, in fact, unenforceable—either because they defeat the remedial purpose of another federal statute or because they are *invalid under generally applicable state contract law*" within the meaning of 9 U.S.C. § 2. *Id.* at 1331 (citation omitted; emphasis added). Recognizing that these questions "go to the validity of the arbitration clause itself, which is by default an issue for the court, not the arbitrator," the court nonetheless held that the parties had "contracted around that default rule" by incorporating within their arbitration agreement the rules of the American Arbitration Association. *Id.* at 1333. The court held that, because the AAA rules clearly and unmistakably vested in the arbitrator the authority to decide all issues relating to the validity of the arbitration agreement, it was "unnecessary" for the court to reach these issues. *Id.* at 1332-33. The court therefore enforced the parties' agreement so that the challenge to the remedial restrictions would be decided by the arbitrator and not the court. *Id.* at 1333.[7]

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[7] *See also Regal Lager, Inc. v. Baby Club of Am., Inc.*, No. 1:06-CV-0962-JE, 2006 U.S. Dist. LEXIS 84610, *12-13 (N.D. Ga. Nov. 21, 2006) (citing *Terminix*, court held that a claim that the arbitration agreement was unenforceable due to lack of mutuality was properly for the arbitrator).

By contrast, under the Ninth Circuit's holding in this case, the claim of unconscionability advanced in *Terminix* would have been reserved for the court to decide despite the parties' clear and unmistakable agreement to the contrary. Thus, if the *Terminix* case were brought in the Ninth Circuit and not the Eleventh Circuit, the outcome would have been entirely different.

The Ninth Circuit's approach also conflicts with the Eighth Circuit Court of Appeals' holding in *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003). In *Bailey*, the employee plaintiffs contended that the arbitration agreements they had signed were unenforceable because the agreements limited their statutory remedies under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, imposed significantly greater costs upon them than would apply in a judicial forum and did not provide for collective actions as did the FLSA. *Id.* at 822 n.1. However, the arbitration agreement authorized the arbitrator to decide if the agreement was void or voidable and to sever any unenforceable terms. *Id.* at 824 n.3. Despite the existence of this provision, the district court declared the arbitration agreement void and unenforceable because of the procedural terms and remedial limitations to which plaintiffs objected. *Id.* at 823.

The Eighth Circuit reversed, holding that the parties' arbitration agreement "clearly and unmistakably left the issues addressed by the district court to the arbitrators in the first instance." *Id.* at 824. Assuming that the grounds for revocation of the arbitration agreement under section 2 of the FAA, 9 U.S.C. § 2, included the grounds for invalidity posited by plaintiffs, the Eighth Circuit, citing *AT&T* and

First Options, held that the "issues of arbitrability are to be decided by the arbitrator * * *." *Id.*

The Eighth Circuit's decision in *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623 (8th Cir. 2006), also illustrates a fundamental split with the Ninth Circuit. In *Sadler*, the district court refused to compel arbitration of the homeowners' claims against the lender on the grounds that "it would be unconscionable to require [the homeowners] to arbitrate claims" that arose out of the lender's "self-help" in seeking foreclosure. *Id.* at 624. The Eighth Circuit reversed, again citing *First Options*, on the ground that the parties' arbitration agreement required that "[a]ny controversy concerning whether an issue is arbitrable shall be determined by the arbitrator[s]." *Id.* at 624-25.

The Ninth Circuit's holding in this case, that a *mere claim* of unconscionability nullifies clear language giving the arbitrator the power to decide the enforceability of the agreement, stands in stark contrast to the Eighth Circuit's holdings in *Bailey* and *Sadler*. In these cases, the Eighth Circuit gave effect to the clear and unmistakable language of the arbitration agreement as written, just as this Court's precedents require. *See also Fallo v. High-Tech Inst.*, 559 F.3d 874, 878, 880 (8th Cir. 2009) ("We find that the district court erred when it held that it had the authority to determine the question of arbitrability because the parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer that question.").

B. The Ninth Circuit's Approach Is Also Contrary to Opinions of the First Circuit.

Opinions of the First Circuit Court of Appeals also conflict with the Ninth Circuit's blanket rule that arbitrators have no authority under the FAA to ever decide issues of contract validity in the face of an unconscionability challenge. The First Circuit instead holds that when the parties clearly and unmistakably allow the arbitrator to determine his or her own jurisdiction, as they have done here, then the issue of arbitrability is for the arbitrator to decide. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (International Chamber of Commerce arbitration rules which were incorporated in arbitration agreement "clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose existence and validity is being questioned" (emphasis in original)).

In *Awuah,* the First Circuit adhered to its broad pronouncement in *Apollo Computer* that parties to an arbitration agreement can "contract for the arbitrator to decide challenges to his own authority," but refined the rule in the narrow and unusual context of challenges, not that the terms of the arbitration agreement were unconscionable, but that the arbitral remedy was "illusory." *Awuah*, 554 F.3d at 11-12.[8]

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[8] In deciding to adhere to its ruling in *Apollo Computer*, the First Circuit in *Awuah* noted that "the Supreme Court has not said definitively whether the arbitrator gets to decide [a dispute about the validity of the arbitration clause] where, as here, arbitration rules incorporated in the contract say that the arbitrator should decide whether the arbitration clause is valid." *Awuah*, 554 F.3d at 11. The court speculated that this Court might

In *Awuah*, the First Circuit ruled that the parties' arbitration agreement, which incorporated AAA rules giving the arbitrator authority to decide issues regarding the "existence, scope or validity of the arbitration agreement," met the "clear and unmistakable" standard set down by this Court and was entitled to enforcement. *Id.* at 11. However, despite this ruling, the First Circuit held that the trial court would nonetheless be tasked with the duty to determine whether the opponent of arbitration could meet the "high" standard of establishing "whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." *Id.* at 13 (emphasis in original).

Significantly, the First Circuit stated that it was not reserving for judicial decision the issue of unconscionability, which "was essentially a fairness issue." *Id.* at 13. Instead, the First Circuit directed the trial court not to determine unconscionability, an issue that the parties' agreement placed squarely within the arbitrator's province, but to engage in a "refocused" and therefore narrower inquiry "as to whether the arbitration remedy in this case is illusory." *Id.* The First Circuit's concern was that, "if the terms for getting an arbitrator to decide the issue are impossibly burdensome," arbitration prevents

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permit the arbitrator to decide the issue based on "*Howsam*'s principle of party autonomy." *Id.* On the other hand, the court speculated that this Court might "conceivably" view "the validity of the arbitration clause as a special case in which challenges should be decided by the judge, either as a matter of policy or because of statutory language." *Id.* This discussion underscores the unsettled state of the law and provides strong support for a grant of the petition in this case.

plaintiffs from vindicating their rights and "is no longer a valid alternative to traditional litigation." *Id.* at 13. Therefore, only if the arbitration remedy was "truly illusory" should the court refrain from ordering that all issues be decided by the arbitrator according to the express terms of the arbitration agreement. *Id.* at 13.

The First Circuit's decision in *Awuah* that arbitration must be ordered unless it was an "illusory" process is wholly consistent with this Court's decision in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). In *Randolph*, the Court refused to declare unenforceable an arbitration agreement that was silent about who would pay the costs of the arbitration. Focusing on whether "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" and rejecting "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" the Court placed on the party resisting arbitration the burden of showing the likelihood of incurring prohibitive expense and establishing that the claims at issue were therefore unsuitable for arbitration. *Id.* at 89-90 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), and *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). Absent such a showing, the Court, applying the "liberal federal policy favoring arbitration agreements," held that the arbitration agreement was enforceable. *Randolph*, 531 U.S. at 91, quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Citing *Randolph*, the First Circuit in *Awuah* placed a similar burden on parties resisting arbitration: to demonstrate that "in practical effect they have no real

opportunity to get issues, including unconscionability, resolved in arbitration." *Awuah*, 554 F.3d at 12.

Awuah played a prominent role in the Ninth Circuit's analysis of Jackson's claims herein. Like this case, the plaintiffs in *Awuah* contended that the arbitration agreement was unconscionable. Unlike this case, the *Awuah* plaintiffs also contended that the arbitral remedy was illusory. The Ninth Circuit rejected the First Circuit's view that under the "clear and unmistakable" language of the arbitration agreement all issues regarding the validity of the arbitration agreement were for the arbitrator, including garden-variety unconscionability claims, unless the party resisting arbitration met the high standard of demonstrating "impossibly burdensome" restrictions that rendered the arbitration remedy illusory. (App., *infra* 18a). Recognizing that the First Circuit "was careful to state" that its concern was not with unconscionability, which was "essentially a fairness issue," the Ninth Circuit distinguished its own broad holding in favor of judicial intervention and against arbitral authority from the very narrow holding of the First Circuit, noting that:

> However, while the First Circuit stated that the threshold inquiry it mandated did not encompass unconscionability, we hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator.* (App., *infra* 17a-18a; emphasis added).

The Ninth Circuit's holding is thus completely at odds with the First Circuit's more limited view and writes out of the arbitration agreement the clear and unmistakable language giving the arbitrator authority to determine contract enforceability.

In dissent, Judge Hall correctly recognized that, while the majority cited *Awuah*, it "then expands the district court's inquiry" beyond what that case envisioned. (App., *infra* 24a). Judge Hall objected to this expansion of judicial inquiry because it was directly contrary to the language of the arbitration agreement, language that cases like *First Options* hold is fully enforceable. (App., *infra* 23a-24a).

Eschewing the more limited approach to judicial involvement taken by the First Circuit, an approach that gives effect to the words used in the arbitration agreement and respects this Court's precedents supporting party autonomy, the Ninth Circuit's decision strikes out on its own and renders the language of the arbitration agreement a nullity upon a mere claim of unconscionability. The Ninth Circuit's decision is in direct conflict with the First Circuit, a conflict which should be resolved by this Court.[9]

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[9] While not dealing with issues of unconscionability like the First, Eighth and Eleventh Circuits, the Second Circuit has also enforced clear and unmistakable language in arbitration agreements to assign the issue of contract validity to the arbitrator, varying the default rule that would otherwise apply absent the parties' agreement. In *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), the Second Circuit held that where the parties incorporated the AAA rules giving the arbitrator the power to determine his own jurisdiction, including objections to the existence, scope or validity of the arbitration agreement, "it is the province of the arbitrator to decide whether a valid arbitration agreement exists." *Id.* at 211. Since the determination of whether an arbitration agreement is procedurally and/or subs-

C. The Federal Circuit Takes A Different Approach.

In *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), the Federal Circuit Court of Appeals took a very different approach. In that case, the court concluded that the arbitration agreement established the parties' clear and unmistakable intent to delegate arbitrability decisions to an arbitrator but held that the trial court must nonetheless resolve the opposing party's assertions that the claim of arbitrability was "wholly groundless." The court stated:

> A district court's inquiry in order to be "satisfied" pursuant to section 3 of the FAA begins with the question of who has the power to determine the arbitrability of a dispute between the parties. If the court concludes that the parties clearly and unmistakably intended to delegate the power to an arbitrator, then the court should also inquire as to whether the party's assertion of arbitrability is "wholly groundless."

Id. at 1374.

The Federal Circuit's "wholly groundless" test lies somewhere between the Ninth Circuit's blanket holding herein that "clear and unmistakable" language can be completely disregarded based upon a mere claim of unconscionability and the First Circuit's holding in *Awuah* that arbitrators possess authority to decide arbitrability under such language unless the party opposing enforcement of the arbitra-

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tantively unconscionable is nothing more than a determination of the contract's validity and enforceability, the Second Circuit's holding appears to include unconscionability within its ambit.

tion agreement can meet the high burden of establishing that the arbitral remedy is truly illusory. On the other hand, the Eighth and Eleventh Circuits do not appear to place any limits upon the enforceability of contract language vesting the arbitrator with the power to determine arbitrability. These disparate views show the sharp divisions among the circuits on the important legal issue presented in this petition and argue strongly in favor of this Court's review.[10]

III. State Courts Are Also In Serious Conflict Over This Legal Issue.

It is not only the federal courts that are in conflict over the issue presented. State courts interpreting the FAA are also in conflict. For example, a district of the California Court of Appeals recently held that a clause in an arbitration agreement governed by the FAA giving the arbitrator exclusive authority to

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[10] Federal district courts are also in conflict over the issue presented by this petition. Some courts hold that clear and unmistakable language in the arbitration agreement vests the arbitrator with the authority to determine claims of unconscionability. *See, e.g., Vidrine v. Balboa Ins. Co.*, 597 F. Supp. 2d 687, 690 (S.D. Miss. 2009) (issue of unconscionability for the arbitrator under agreement that authorized arbitrator to decide issues of validity and enforceability); *Pantel v. TMG of Ill., LLC*, No. 07C7252, 2008 U.S. Dist. LEXIS 106745, *9 (N.D. Ill. Nov. 17, 2008) (the same); *Taylor v. Rent-A-Center*, No. 5:06CV2228, 2007 U.S. Dist. LEXIS 57689, *5 (N.D. Ohio Aug. 8, 2007) (the same); *Stewart v. Paul. Hastings, Janofsky & Walker*, 201 F. Supp. 2d 291, 292 (S.D.N.Y. 2002) (arbitrator given authority to determine if agreement was void or voidable). However, this view is not universally shared. *See Allen v. Regions Bank*, No. 2:09cv70KS-MTP, 2009 U.S. Dist. LEXIS 89055, *10-11 (S.D. Miss. Sep. 10, 2009) (question of whether a valid contract exists is for the court despite the existence of a "*First Options* clause" requiring arbitrator to determine questions of arbitrability).

decide enforceability issues is itself unconscionable under California law and is therefore unenforceable. *Ontiveros v. DHL Express (USA), Inc.*, 164 Cal. App. 4th 494, 506 (Cal. App. 2008), *rev. denied*, No. A114848, 2008 Cal. LEXIS 12259 (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 1048 (2009), following *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 145 (Cal. App. 2007).[11]

But the Texas Court of Appeals held to the contrary, determining that an arbitration clause that reallocates traditional court functions to the arbitrator, including the authority to determine unconscionability, is enforceable under the FAA. *Ernst & Young LLP v. Martin*, 278 S.W.3d 497, 500 (Tex. App. Houston 14th Dist. 2009). Citing *First Options* and *Howsam*, the court decided that the "rule that courts usually decide issues of arbitrability is a default rule" that can be varied by the parties' mutual agreement. *Id.* *See also CitiFinancial Corp., L.L.C. v. Peoples*, 973 So. 2d 332, 340 (Ala. 2007) (Supreme Court of Alabama reversed lower court's ruling that claims were not arbitrable because the arbitration provision clearly and unmistakably established the parties' intent to submit issues of arbitrability to the arbitrator); *Berkley v. H & R Block Eastern Tax Servs., Inc.*, 30 S.W.3d 341, 344 (Tenn. Ct. App. 2000), *rev. denied*, No. E1999-00379-SC-R11-CV, 2000 Tenn.

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[11] However, even within California, there is conflict. *See Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1565 (Cal. App. 2009) (another district of the California Court of Appeals declined to decide "the question whether parties to a contract can agree to have the arbitrator decide unconscionability" while noting California appellate cases finding that "[b]ecause the parties are the masters of their collective fate, they can agree to arbitrate almost any dispute—even a dispute over whether the underlying dispute is subject to arbitration."

LEXIS 621 (Tenn. Nov. 6, 2000), *cert. denied*, 532 U.S. 971 (2001) (where arbitration agreement "specifically states that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement," question of arbitrability was for the arbitrator).

When considered along with the serious conflicts among the federal circuit courts of appeals, these conflicts among state courts interpreting the FAA highlight the extremely unsettled nature of the law.

CONCLUSION

As it stands today, the treatment of arbitration provisions that unmistakably vest arbitrators with the authority to decide all "gateway" issues of arbitrability, including unconscionability, depends on the jurisdiction in which the case is heard, creating a patchwork of varying approaches rather than a uniform and consistent rule of federal law. This Court should grant this petition to bring clarity and certainty to this important legal issue and to determine the enforceability of countless arbitration agreements throughout the United States that either expressly state that arbitrators may decide all issues of arbitrability or which incorporate the rules of arbitration services such as AAA that similarly give arbitrators such broad authority.

The central purpose of the FAA is to enforce agreements to arbitrate according to their express terms. The Ninth Circuit's decision in this case undermines this purpose and invites parties resisting arbitration to avoid the clear terms of the arbitration agreement by simply claiming unconscionability. The Ninth Circuit's decision is fundamentally at odds with prior decisions of this Court holding that parties

can agree to vest the arbitrator with broad authority to decide issues of arbitrability, despite the default rule that courts normally decide these issues. The Ninth Circuit's decision also conflicts with the holdings of cases from the First, Second, Eighth, Eleventh, and Federal Circuit Courts of Appeals, holdings which accord much greater dignity to the language of the parties' agreement authorizing arbitral authority to decide arbitrability and which are more faithful to this Court's precedents.

The current split in the circuits and state courts on the issue presented in this petition should be reconciled into one rule of law, and only this Court has the power to do so. For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2009

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 06/07/2007]

03:07-CV-0050-LRH (RAM)

ANTONIO JACKSON,
Plaintiff,

vs.

RENT-A-CENTER-WEST INC.,
Defendants.

ORDER

Presently before this court is a Motion to Dismiss Proceedings and Compel Arbitration (#6[1]) brought by Defendant Rent-A-Center West, Inc. Plaintiff Antonio Jackson has submitted opposition (#7), to which Defendant has subsequently replied (#8).

FACTS AND PROCEDURAL HISTORY

This issue arises out of a signed agreement to arbitrate entered into by Plaintiff Antonio Jackson and Defendant RAC. While employed by Defendant, Plaintiff repeatedly sought promotion to a higher position. After being passed over for promotion, Plaintiff complained to his store manager and spoke with Human Resources. Plaintiff was eventually promoted, however, his employment with Defendant

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[1] References to (#XX) refer to the court's docket.

was terminated within two months of his promotion. Plaintiff is alleging Defendant repeatedly passed him over for promotion based on his race. Additionally, Plaintiff alleges his termination was for retaliatory purposes.

As part of Plaintiff's employment with Defendant, Plaintiff executed an arbitration agreement. Under this Mutual Agreement to Arbitrate Claims, Plaintiff agreed to arbitrate all "past, present, and future" claims or controversies concerning his employment with Defendant. The relevant portion of the agreement reads as follows:

> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ('claims'), past, present, or future, whether or not arising out of my application for employment, assignment/employment, or the termination of my assignment/employment that the Company may have against me or that I have against any of the following: (1) the Company, (2) its officers, directors, employees, or agents in their capacity as such or otherwise . . . .
>
> The only claims that are arbitrable are those that, in the absence of this agreement, would have been justiciable under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers' compensation, marital status, medical condition, handicap or disability). . . .

> Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit . . . in any way related to any claim covered by this Agreement.

The terms of the arbitration agreement provide that Plaintiff and Defendant will share the costs of arbitration equally. However, in the event a different allocation of costs is required by law to enforce the agreement, then such shall be the case. Additionally, Plaintiff agreed that the arbitrator will have final say over whether the Agreement to Arbitrate is enforceable. The arbitration agreement states:

> The Arbitrator, and not any federal, state, or local court or agency shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

As a result of his termination, Plaintiff has filed suit. Defendant now moves to dismiss the proceedings and compel arbitration. Plaintiff opposes, claiming the Agreement to Arbitrate is unconscionable and therefore void.

DISCUSSION

The Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes in commercial settings "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether a dispute is subject to arbitration under the FAA, the court must determine whether a valid contract agreeing to arbitrate was

formed. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). Where an arbitration agreement is found, such agreements are to be rigorously enforced. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999).

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers*, 363 U.S. at 582. "[T]he *'question of arbitrability,' is 'an* issue for judicial determination unless the parties clearly and unmistakenly provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (2002). Where the contract agreeing to arbitrate is challenged as a whole, it is for the arbitrator to decide the validity of the agreement. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440; 126 S.Ct. 1204, 1208-09 (2006).

The Agreement to Arbitrate clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable. Plaintiff challenges the agreement to arbitrate as a whole. Plaintiff claims it is void as unconscionable. When there is an agreement to arbitrate, the court cannot hear challenges to the contract as a whole. *Buckeye Check Cashing*, 126 S.Ct. at 1208-09.

As such, the question of arbitrability is a question for the arbitrator. Accordingly, as it appears a valid arbitration agreement exists which would compel arbitration on the underlying issue disputed by the parties, the court orders all claims concerning the validity of the underlying arbitration clause be submitted to arbitration as agreed to by the parties.

Furthermore, even if the court were to examine the merits of Plaintiff's assertion of unconscionablity, there appears to be a lack of evidence to suggest an unconscionable agreement. In determining whether an agreement to arbitrate is valid, federal courts should apply ordinary state-law governing the formation of a contract. *Ferguson v. Country Wide Credit Industries, Inc.,* 298 F.3d 778, 782 (9th Cir. 2002). Under Nevada law, an agreement to arbitrate must be both procedurally and substantively unconscionable for a court to preclude enforcement. *D.R. Horton, Inc. v. Green,* 120 Nev. 549, 553 (Nev. 2004). A clause is procedurally unconscionable when one party lacks a meaningful opportunity to agree to the terms because of unequal bargaining power or because the effect of the agreement is not readily understandable. *Id.* at 554. An agreement to arbitrate is substantively unconscionable when the terms of the agreement are unfairly one-sided. *Id.*

Plaintiff argues that the Agreement to Arbitrate is substantively unconscionable because the plaintiff may have to unfairly pay burdensome arbitration costs. However, mere supposition about overly burdensome costs is not a sufficient reason to invalidate an arbitration agreement. *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 92 (2000). The asserting party must show a likelihood of bearing the overly burdensome costs. Here, Plaintiff has offered no evidence to demonstrate a likelihood of overly burdensome expense. Additionally, the agreement to arbitrate expressly contains a clause allowing the apportionment of costs to be altered in the event the law requires a different allocation of costs to make the Agreement enforceable. Therefore, there appears to be nothing to suggest substantive unconscionablity. As a showing on both prongs of the test is

required, the court has no need to examine procedural unconscionability.

Finally, Defendant has requested attorney's fees. However, Defendant has cited no authority permitting the court to award attorney's fees in a case such as this. Furthermore, the court finds no bad faith on the part of the Plaintiff in bringing this suit. Therefore, no attorney's fees shall be awarded.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Proceedings and Compel Arbitration (#6) is GRANTED.

IT IS FURTHER ORDERED that Defendant's request for attorney's fees (#6) is DENIED.

DATED this 6th day of June, 2007

/s/ LARRY R. HICKS
LARRY R. HICKS
United States District Judge

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16164
D.C. No. CV-07-00050-LRH/RAM

ANTONIO JACKSON,
Plaintiff-Appellant,

v.

RENT-A-CENTER WEST, INC.,
Defendant-Appellee

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted November 21, 2008*
San Francisco, California
Filed September 9, 2009

Before: Cynthia Holcomb Hall, Thomas G. Nelson and Sidney R. Thomas, *Circuit Judges*.

Opinion by Judge Thomas;
Dissent by Judge Hall

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

COUNSEL

Ian E. Silverberg, Hardy Law Group, Reno, Nevada, for the appellant.

Michael T. Garone, Schwabe, Williamson & Wyatt, Portland, Oregon, for the appellee.

OPINION

THOMAS, *Circuit Judge*:

Antonio Jackson appeals from a district court order dismissing his statutory race discrimination claim and compelling arbitration. Under the circumstances presented here, we conclude that the district court was required to determine whether the arbitration agreement was unconscionable, and we remand for further proceedings.

I

Jackson was an employee of Rent-A-Center West, Inc. ("Employer"). On February 1, 2007, Jackson filed a complaint in the United States District Court for the District of Nevada alleging race discrimination and retaliation on the part of the Employer under 42 U.S.C. § 1981. The Employer moved to dismiss proceedings and compel arbitration, relying on a Mutual Agreement to Arbitrate Claims ("Agreement to Arbitrate," "Agreement") Jackson signed as a condition of his employment with the Employer when he was initially hired.[1] The Agreement specifically includes

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[1] In the district court, the Employer filed the declaration of its Director of Compensation and Benefits stating that "[s]ince on or about July 2000, Rent-A-Center has required all new employees to agree to arbitrate all past, present, and future disputes."

claims for discrimination in the list of claims that must be resolved by arbitration.

Of particular relevance to this appeal is a section of the Agreement entitled "Arbitration Procedures," which includes the following provision:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

The Employer argued in the district court that, in light of this provision, the threshold question of whether the arbitration agreement was valid and enforceable was for an arbitrator, not the court. Jackson argued in response that the Agreement was unconscionable. In particular, he contended that the Agreement was substantively unconscionable because it contained one-sided coverage and discovery provisions and a provision specifying that the arbitrator's fee was to be equally shared by the parties. Jackson also argued that the Agreement was procedurally unconscionable because the form contract was presented to him as a non-negotiable condition of his employment.

The district court granted the Employer's motion to dismiss proceedings and compel arbitration. The court found that the Agreement to Arbitrate "clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable" and held that "the question of arbitrability is for the arbitrator." The district court also held that, even if it were to reach the

merits of Jackson's assertion that the Agreement was unconscionable, Jackson had not demonstrated that the Agreement was substantively unconscionable.

On appeal, Jackson challenges the district court's determination that enforceability of the Agreement to Arbitrate was a question for the arbitrator. He further argues that the district court erred in holding Jackson had not demonstrated the Agreement was substantively unconscionable. We review *de novo* a district court's decision to compel arbitration. *Bushley v. Credit Suisse First Boston,* 360 F.3d 1149, 1152 (9th Cir. 2004).

II

The Federal Arbitration Act ("FAA") provides that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). While the FAA expresses a "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000) (internal quotation marks omitted), federal law "directs courts to place arbitration agreements on equal footing with other contracts," *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 293 (2002). Accordingly, under 9 U.S.C. § 2, [a]rbitration agreements . . . are subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.* 328 F.3d 1165, 1170 (9th Cir. 2003). The threshold question before us is whether a court or an arbitrator is to decide whether an arbitration agreement was unconscionable and hence unenforceable.

A

The Supreme Court has held that, as a matter of federal substantive arbitration law, when a party

challenges the validity of a contract between the parties, but "not specifically its arbitration provisions," the challenge to the contract's validity should be considered by an arbitrator, not a court. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 446 (2006). The flip side of this rule, however, is that when a party specifically challenges the validity of arbitration provisions within a larger contract, apart from the validity of the contract as a whole, a court decides the threshold question of the enforceability of the arbitration provisions. We applied this rule in *Nagrampa v. MailCoups, Inc.,* 469 F.3d 1257, 1264 (9th Cir. 2006) (en banc), stating that "[w]hen the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2." *See also Ingle,* 328 F.3d at 1170; *Ticknor v. Choice Hotels Int'l, Inc.,* 265 F.3d 931, 941 (9th Cir. 2001).

The rationale behind a rule requiring courts to make the threshold determination when the challenge specifically targets the validity of arbitration provisions is that arbitration is itself a matter of contract. "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547 (1964). Indeed, as a matter of federal arbitration law, a court may not compel arbitration until it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4 (2000). The FAA precludes state laws that single out arbitration provisions for special treatment, but does not allow federal courts to "shirk" their duty to consider,

by applying the relevant state contract law principles, whether an "arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA." *Nagrampa,* 469 F.3d at 1264.

Whether court or arbitrator is to determine arbitrability is more straightforward in this case than it was in *Nagrampa,* a case involving a challenge to arbitration provisions located within a larger "container contract." Jackson's merits dispute with the Employer does not arise out of a contract between them, but is rather based in federal statutory discrimination law. Jackson challenges the free-standing Agreement to Arbitrate he signed, contending that the Agreement is unconscionable and that he cannot be compelled to arbitrate his statutory discrimination claims.[2]

We confronted a similar situation in *Davis v. O'Melveny & Myers,* 485 F.3d 1066 (9th Cir. 2007). There, we held that where the plaintiff brought claims for violation of overtime laws against her employer, whether the employer's arbitration agreement was unconscionable "is for a court to decide." *Id.* at 1072. Pursuant to *Buckeye, Nagrampa, Ticknor,* and *Davis,* we conclude that the question whether the Agreement was unconscionable was for the court to decide.

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[2] The district court incorrectly applied *Buckeye's* rule that a global challenge to the validity of a container contract in which arbitration provisions are located is to be determined by the arbitrator. Jackson challenged the Agreement to Arbitrate itself and did not challenge the validity of a contract setting forth other substantive contractual obligations between the parties. Accordingly, the "severability" principle announced in *Buckeye* and the Court's earlier decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), does not apply.

The district court erred in concluding that unconscionability was an issue to be decided by the arbitrator.

B

The Employer argues that the validity of the Agreement to Arbitrate must be determined by an arbitrator in accordance with the terms of the Agreement. The Employer relies on *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), in which the Court stated that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e] evidence that they did so." *Id.* at 944 (quoting *AT&T Techs., Inc. v. Comm'ns Workers*, 475 U.S. 643, 649 (1986)). The Court explained this principle as based in the parties' expectations about whether court or arbitrator determines the issue of whether they agreed to arbitrate:

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

First Options, 514 U.S. at 945.

In contrast to *First Options*, we are not presented with "silence or ambiguity on the 'who should decide the arbitrability point.'" Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator. What he *does* dispute, however, is that he meaningfully agreed to the terms of the form Agreement to Arbitrate,

which he contends is procedurally and substantively unconscionable. Jackson argues that, in light of the parties' unequal bargaining power, the fact that the Agreement was presented as a non-negotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the Agreement, he did not meaningfully assent to the Agreement.

The Supreme Court has "determined that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Howsam, v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)); *see also Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) ("The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. The Employer would have us limit our inquiry regarding whether the parties agreed to arbitrate arbitrability to the language of the contract. *First Options* indicates that the presumption—that courts determine whether parties agreed to arbitrate—can only be overcome with "clear and unmistakable evidence" of such an intent. *See id.* at 944. It did not suggest, however, that where arbitration provisions—unlike other contractual provisions—are concerned, clear contractual language is enforceable per se. Rather, the Court stated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter *(including arbitrability)*, courts generally . . . should apply ordinary state-law principles that govern the

formation of contracts." *Id.* at 944 (emphasis added). The Court explained that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (citations omitted). *First Options,* then, directs that as a threshold matter the court must decide—by applying "ordinary state-law principles"—whether the parties agreed to arbitrate arbitrability.

The Employer urges us to consider only that Jackson signed the Agreement, which contains language consigning the arbitrability question to the arbitrator. However, the FAA was enacted in part "to place arbitration agreements 'upon the same footing as other contracts.'" *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). To engage in an artificially contracted review of what the parties agreed to here would contravene this principle and violate the proper role of cooperative federalism. Rather, we hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.

C

The Employer also relies on inapposite decisions from other circuits, which have held enforceable agreements between sophisticated commercial entities assigning the question of arbitrability to the arbitrator. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327, 1333 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208, 210-11 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg,* 886

F.2d 469, 472-74 (1st Cir. 1989). *But see Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1359 (Fed. Cir. 2004).

However, these cases are easily distinguishable. Unlike the case at bar, there were no allegations in these cases that the agreements were formed under circumstances of grossly unequal bargaining power. In none of these cases did the party resisting arbitration contend that there was no meaningful agreement to arbitrate in the first place.

Rather, the issue at hand is similar to the question confronted by the First Circuit in a case involving claims that a form agreement between parties of markedly unequal bargaining power was unconscionable. In *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009), a class of franchisees sued a large commercial enterprise for fraud, misrepresentation, breach of contract, and violations of various labor laws. The corporation moved to compel arbitration with regard to three franchisees whose agreements contained arbitration clauses. These agreements incorporated by reference the Rules of the American Arbitration Association, which provide in relevant part that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* at 9. The franchisees responded that the arbitration agreements were unconscionable.

The First Circuit concluded that Supreme Court precedent did not determine the outcome, *id.* at 10-11, and followed its own precedent in *Apollo Computer*, 886 F.2d at 472-74, holding that the language incorporated by reference into the agreement was "about as 'clear and unmistakable' as language can get." *Id.*

at 11 (citation omitted). Nonetheless, the *Awuah* court did not limit its inquiry to the agreement's language. Rather, the court stated:

> In principle, having the arbitrator decide questions of validity may be fine if the parties so agreed; but if the terms for getting an arbitrator to decide the issue are impossibly burdensome, that outcome would indeed raise public policy concerns. If arbitration prevents plaintiffs from vindicating their rights, it is no longer a valid alternative to traditional litigation.

Id. at 12 (quotations omitted). The court held that "appellees are entitled to a ruling by [the district] court as to whether the arbitration remedy in this case is illusory." *Id.* at 13. The First Circuit was careful to state that its "concern here is not with unconscionability—essentially a fairness issue—but more narrowly with whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." *Id.* (internal citation omitted). In short, the First Circuit held that where a contract delegates determination of whether an arbitration provision is enforceable to the arbitrator, a party challenging the provision is entitled to have a court determine whether "the arbitration remedy is illusory."

We agree with the First Circuit that, where a party to an agreement to arbitrate contends that the arbitration agreement in particular was unconscionable and that he made no meaningful choice to enter the agreement, summary enforcement of the agreement is improper. However, while the First Circuit stated that the threshold inquiry it mandated did not encompass unconscionability, we hold that where a

party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. This rule applies even where the agreement's express terms delegate that determination to the arbitrator. We hold that where, as here, an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter.

III

We next address the district court's alternate holding that the Agreement to Arbitrate was not unconscionable, and was therefore enforceable. The agreement in this case was formed in Nevada. Nevada law permits the invalidation of arbitration provisions if they are both substantively and procedurally unconscionable. *D.R. Horton, Inc. v. Green,* 96 F.3d 1159, 1162-63 (Nev. 2004). Substantive unconscionability arises when contract terms are one-sided. *Id.* Jackson claims that three aspects of the agreement are one-sided: (1) claim coverage, (2) costs, and (3) discovery. Though all three issues were argued to the district court below, that court only addressed one of them, determining that the provision regarding costs was not substantively unconscionable.

The district court did not err in determining that the cost provision was not substantively unconscionable. The arbitration agreement provided that the parties would share costs equally, unless the law of the jurisdiction where the arbitration would be held required otherwise, in which case that law would be

followed. Jackson argues that, because this might subject him to costs greater than those usually associated with litigation, the provision is substantively unconscionable.

In evaluating cost one-sidedness, the Supreme Court of Nevada has held that "[o]rdinary consumers may not always have the financial means to pursue their legal remedies, and significant arbitration costs greatly increase that danger. In such a circumstance, the contract would lack [a] modicum of bilaterality." *Id.* at 1165 (internal quotation marks omitted). Discussing a challenge to the equal sharing of fees, the court cited our precedent invalidating such fee provisions and said that the agreement's "silence regarding potentially significant arbitration costs does not, alone, render the agreement unenforceable . . . . [but may be] properly considered . . . in examining the asymmetrical effects of the provision." *Id.* (citing *Ting v. AT & T,* 319 F.3d 1126, 1148-49 (9th Cir. 2003)).

In this case, the agreement contains both a fee-sharing provision and the potential for undisclosed significant arbitration costs. Nonetheless, *D.R. Horton* held that silence about those potential costs was not enough standing alone to find an agreement unenforceable. *Id.* Jackson presented no evidence suggesting prohibitive costs would *actually* be incurred and so did not meet his burden of establishing the fee-sharing provision and silence regarding potentially significant arbitration costs render the arbitration agreement unconscionable. *See Green Tree Fin. Corp.-Ala.*, 531 U.S. at 92.

Furthermore, the fee-sharing provision specifically states that "[i]n the event the law of the jurisdiction in which the arbitration is held requires a different

allocation of fees and costs in order for this Agreement to be enforceable, then such law shall be followed." In other words, the agreement itself effectively states that the fee-sharing provision is inapplicable if it is unconscionable under Nevada law. Jackson fails to address or counter this argument. For these reasons, we conclude that the district court correctly determined that the costs provision was not substantively unconscionable.

However, the district court did not address Jackson's remaining arguments about substantive unconscionability, namely, that the Agreement's coverage and discovery provisions were one-sided and unfairly favored the Employer. Therefore, we must vacate the judgment and remand for the district court to complete its analysis of substantive unconscionability.[3]

IV

In sum, we conclude that a court must decide the threshold question of arbitrability when a plaintiff challenges an arbitration agreement as unconscionable, but the agreement provides that the enforceability of the arbitration agreement is itself an issue to be resolved through arbitration. We remand for further proceedings consistent with this opinion. The parties shall each bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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[3] The district court did not address procedural unconscionability because it found no substantive unconscionability, and both prongs must be met for a finding of unconscionability. If the district court determines on remand that the agreement is substantively unconscionable, then it should determine whether the agreement is procedurally unconscionable.

HALL, *Circuit Judge*, dissenting:

This case concerns an arbitration agreement more favorable to the employee than most this court sees. It stated plainly that the arbitrator had the exclusive authority to resolve any dispute regarding the agreement's validity. It permitted modification or revocation by the parties. It allowed Jackson the chance to review it with an attorney prior to signing. In these respects, this was not even a run-of-the-mill arbitration agreement.[1] Jackson's allegations of unconscionability are also vaguer than most.[2] He claims, without any specifics, that the agreement was a condition of his employment and non-negotiable, although the latter is contradicted by the agreement itself. He claims that the agreement lacks mutuality, imposes burdensome costs, and includes one-sided discovery, but only speculates that his costs might exceed the expense of litigation and concedes that the discovery provision is not alone unconscionable. So what we have, then, is an arbitration agreement

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[1] Compare these provisions with others this court has seen. *See, e.g., Nagrampa v. MailCoups. Inc.*, 469 F.3d 1257, 1265, 1281, 1283 (9th Cir. 2006) (describing a non-negotiable agreement which addressed some rules by cross-reference only and where the party resisting arbitration claimed she was not even informed about the arbitration provision on page twenty-five of a thirty-page agreement).

[2] *Nagrampa,* for example, involved a complaint which asserted causes of action challenging the validity of the arbitration agreement and included forty-one allegations stating facts supporting the causes of action. *See id.* at 1264, 1266, 1270, 1283. Jackson's complaint is silent as to the arbitration agreement. Vague allegations appear in his opposition to Rent-a-Center's motion to compel arbitration and are repeated verbatim in the brief to this court.

more favorable than most and unconscionability allegations that are thinner than most.

Nonetheless, the majority's opinion will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even* when the contract language "clearly and unmistakably" chooses a different forum for that question. This is counter to the general policy favoring arbitration of disputes. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (counseling the resolution of "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"). It also makes it difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so "clearly and unmistakably." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The exception begins to look very much like the general rule in that courts will be deciding the question of agreement validity under both scenarios, regardless of what the agreement's language might say about the chosen forum for that question.

In *First Options v. Kaplan, Inc.*, the Supreme Court said a court should not find an agreement "clear and unmistakable" if there is any "silence or ambiguity."[3]

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[3] The majority cites *First Options'* statements that "ordinary state-law principles" should be applied to the question of arbitrability, but neglects to mention that these statements came in the context of the Court's discussion of the general rule wherein

514 U.S. 938, 944 (1995) (alterations omitted); *cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("Absent some ambiguity in the agreement, it is the language of the contract that defines the scope of disputes subject to arbitration."). The majority admits there is no silence or ambiguity here. In *Awuah v. Coverall North America, Inc.*, the out-of-circuit case most on point, the First Circuit found an allegedly unconscionable agreement to be "about as 'clear and unmistakable'" as it could be in stating that agreement validity was for the arbitrator to decide.[4] 554 F.3d 7, 11 (1st Cir. 2009). The majority admits the language is similarly clear and unmistakable here. In light of this, I believe the question of the arbitration agreement's validity should have gone to the arbitrator, as the parties "clearly and unmistakably provide[d]" in their agreement.[5]

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courts decide the question, rather than the "important qualification" to that rule which is at issue here. 514 U.S. at 944.

[4] According to the majority, *Awuah* held that "where a party to an agreement to arbitrate contends that the arbitration agreement in particular was unconscionable and that he made no meaningful choice to enter the agreement, summary enforcement of the agreement is improper." Thomas Op. at 12799. I respectfully disagree. *Awuah* explicitly said its concern was not with unconscionability, and instead held that a district court only has the very limited role of determining "whether the arbitration regime . . . is structured so as to prevent a litigant from having access to the arbitrator." *See* 554 F.3d at 13 (emphasis omitted). Thus, even if an agreement was alleged to be unconscionable, enforcement of the parties' agreement to send that question to arbitration would still be proper unless the party resisting arbitration met the "high" burden of showing that the arbitration was an illusory remedy. *Id.*

[5] The majority cites section 2 of the FAA (and cases referencing that section) regarding the enforceability of unconscionable arbitration agreements. *See* 9 U.S.C. § 2; *Ingle v. Circuit City*

The majority opinion cites *First Options* and *Awuah,* but then expands the district court's inquiry beyond what those cases envisioned. I respectfully disagree with this expansion. Furthermore, to the extent the district court has a role to play here, it should certainly be a more limited one than the majority envisions, perhaps permitting courts to remain attuned to *"well-supported"* claims of unconscionability or the potential that arbitration might be illusory, while still resolving "any doubts" as to what the parties agreed in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626-27 (1985) (emphasis added); *Awuah,* 554 F.3d at 13 (finding a "narrow[ ]" remand appropriate to determine, not unconscionability, but instead whether the litigant could meet a "high" burden to show that arbitration was "truly illusory"); *see also United Steelworkers of Am. v. Am. Mfg. Co.,* 363 U.S. 564, 567-68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract).

For these reasons, I dissent.

Stores, Inc., 328 F.3d 1165, 1170 (9th Cir. 2003); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006). However, everyone agrees that unconscionable arbitration agreements should not be enforced. At issue here is *who* should decide if the agreement is unconscionable when the parties' agreement gives the question to the arbitrator. That issue is not addressed by section two of the FAA. Nor is it addressed by any of the other cases the majority cites, with the exception of *Awuah,* which, as discussed above, supports finding that the parties in this case "clearly and unmistakably" consigned the agreement's validity to arbitration.

APPENDIX C

RENT-A-CENTER, INC.

MUTUAL AGREEMENT TO ARBITRATE CLAIMS

I recognize that differences may arise between Rent-A-Center, Inc. (the "Company") and me during or following my application/assignment/employment, including any/or all periods of employment with the Company and/or separation therefrom, and that those differences may or may not be related to my application/assignment/employment. I understand and agree that by entering into this Agreement to Arbitrate Claims ("Agreement"), I anticipate gaining benefits of a speedy, impartial, final, and binding dispute-resolution procedure.

Except as provided in this Agreement, the Federal Arbitration Act shall govern interpretation, enforcement, and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, state law pertaining to agreements to arbitrate shall apply.

I understand that any reference in this Agreement to the Company will be a reference also to all parent, subsidiary, and affiliated entities, all benefit plans, the benefit plans' sponsors, fiduciaries, administrators, affiliates, and all successors and assigns of any of them.

CLAIMS COVERED BY THE AGREEMENT

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of my application for employment, assignment/employment, or the termination of my assignment/employment that the Company may have

against me or that I may have against any of the following: (1) the Company, (2) its officers, directors, employees, or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary, and affiliated entities, (4) the benefit plans or the plans' sponsors, fiduciaries, administrators, affiliates, and agents, and/or (5) all successors and assigns of any of them.

The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers' compensation, marital status, medical condition, handicap or disability); claims for benefits (except claims under an employee benefit or pension plan that either (1) specifies that its claims procedure shall culminate in an arbitration procedure different from this one, or (2) is underwritten by a commercial insurer which decides claims); and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance, except claims excluded in the section of this Agreement entitled "Claims Not Covered by the Agreement."

Except as otherwise provided in this Agreement, both the Company and I agree that neither of shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination to the Equal Employment Opportunity Commission, or a similar fair employment prac-

tices agency, or an administrative charge within the jurisdiction of the National Labor Relations Board) in any way related to any claim covered by this Agreement.

CLAIMS NOT COVERED BY THE AGREEMENT

Claims I may have for workers' compensation benefits and unemployment compensation benefits are not covered by this Agreement. Also not covered are claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which either party may seek and obtain relief from a court of competent jurisdiction.

TIME UNITS FOR COMMENCING ARBITRATION AND REQUIRED NOTICE ALL CLAIMS

The Company and I agree that the aggrieved party must give written notice of any claim to the other party no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim. Otherwise, the claim shall be void and deemed waived. The legal doctrine of tolling, equitable or otherwise, shall not apply to extend the statute of limitations for bringing a claim covered by this Agreement. I understand that I am encouraged to give written notice of any claim as soon as possible after the event or events in dispute so that arbitration of any differences may take place promptly.

Written notice to the Company, or its officers, directors, employees or agents, shall be sent to its home office to the attention of Coworker Relations. I will be given written notice at the last address provided in writing to the Company. The written notice shall identify and describe the nature of all

claims asserted and the facts upon which such claims are based and the relief or remedy sought. The notice shall be sent to the other party by certified or registered mail, return receipt requested.

REPRESENTATION

Any party may be represented by an attorney or other representative selected by the party.

DISCOVERY

Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. Each party also shall have the right to propound requests for production of documents to any party. The subpoena right specified below shall be applicable to discovery pursuant to this paragraph. Additional discovery, may be had only where the arbitrator selected so orders.

DESIGNATION OF WITNESSES

At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts, and copies of all exhibits intended to be used at the arbitration.

SUBPOENAS

Each party shall have the right to subpoena witnesses and documents for the arbitration, as well as documents relevant to the case from third parties.

ARBITRATION PROCEDURES

The arbitration will be held under the auspices of either the American Arbitration Association ("AAA"), Judicial Arbitration & Mediation Services/Endispute ("J-A-M-S"), or any other service to which the parties agree, with the designation of the sponsoring organi-

zation to be made by the party who did not initiate the claim.

The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance with the then-current Model Employment Arbitration Procedures of the AAA or equivalent (if AAA is designated), the then-current J-A-M-S Employment Arbitration Rules or equivalent (if J-A-M-S is designated), or the applicable rules of any other service to which the parties mutually agree. The arbitrator shall be either a retired Judge, or an attorney who is experienced in employment law and licensed to practice law in the state in which the arbitration is convened (the "Arbitrator"). The arbitration shall take place in or near the city in which I am or was last employed by the Company. The Arbitrator shall be selected as follows: The service selected shall give each party a list of eleven (11) arbitrators drawn from its panel of employment dispute arbitrators. Each party shall have ten (10) calendar days from the postmark date on the list to strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate the claim shall strike first. If no common name remains on the lists of all parties, the selected service shall furnish an additional list of eleven (11) arbitrators from which the parties shall strike alternately, with the party initialing the claim striking first, until only one name remains. That person shall be designated as the Arbitrator.

The Arbitrator shall apply the substantive law including, but not limited to applicable statutes of limitations (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the Claim(s) asserted. The Arbitrator is without Jurisdiction to apply any different substantive law or law of remedies. The Federal Rules of Evidence shall apply. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

The Arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold pre-hearing conferences by telephone or in person as the Arbitrator deems necessary. The Arbitrator shall have the authority to entertain a motion to dismiss and/or a motion for summary judgment by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedure and applicable federal common law. The arbitrator shall be paid an agreed upon hourly rate for the time spent reviewing and ruling on such motions, and such fee shall be paid by the moving party unless otherwise ordered by the Arbitrator or otherwise required by law.

Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings. Should any party refuse or neglect to appear for or participate in, the arbitration hearing, the Arbitrator shall have the

authority to decide the dispute based upon whatever evidence is presented. Either party, upon request at the close of hearing, shall be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the Arbitrator.

The Arbitrator shall render an award by written opinion in the form typically rendered in labor arbitrations no later than thirty (30) days from the date the arbitration hearing concludes or the post-hearing briefs (if requested) are received, whichever is later. The opinion shall be in writing and include the factual and legal basis for the award.

Either party shall have the right, within twenty (20) days of issuance of the Arbitrator's opinion, to file with the Arbitrator a motion to reconsider (accompanied by a supporting brief), and the other party shall have twenty (20) days from the date of the motion to respond. The Arbitrator thereupon shall reconsider the issues by the Motion and promptly either confirm or change the decision, which (except as provided by this Agreement) shall then be final and conclusive upon the parties. The costs of such a motion for reconsideration and written opinion of the Arbitrator shall be borne by the party prevailing on the motion, unless the Arbitrator orders otherwise.

ARBITRATION FEES AND COSTS

The Company and I shall equally share any filing fees and the cost of the Arbitrator's fee, in the amount and manner determined by the Arbitrator, ten (10) days before the first day of hearing. Each party shall pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim which affords the prevailing party attorneys' fees, or if them is a written agreement providing for

fees, the Arbitrator may award reasonable fees to the prevailing party. In the event the law of the jurisdiction in which the arbitration is held requires a different allocation of fees and costs in order for this Agreement to be enforceable, then such law shall be followed.

JUDICIAL REVIEW

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award. A party opposing enforcement of an award may bring a separate action in any court of competent jurisdiction to set aside the award, where the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

INTERSTATE COMMERCE

I understand and agree that the company is engaged in transactions involving interstate commerce and that my assignment/employment with the Company involves such commerce.

REQUIREMENTS FOR MODIFICATION OR REVOCATION

This Agreement to arbitrate shall survive the termination of my assignment/employment and the expiration of any benefit. It can only be revoked or modified by a writing signed by the parties which specifically states an intent to revoke or modify this Agreement.

SOLE AND ENTIRE AGREEMENT

This is the complete agreement of the parties on the subject of arbitration of disputes. This Agreement supersedes any prior or contemporaneous oral or written understandings on the subject. No party is

relying on any representations, oral or written, on the subject of the effect, enforceability, or meaning of this Agreement, except as specifically set forth in this Agreement. All remaining provisions shall remain in full force and effect.

CONSTRUCTION

If any provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement. All remaining provisions shall remain in full force and effect.

CONSIDERATION

The promises by the Company and by me to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other.

NOT AND EMPLOYMENT AGREEMENT

This Agreement is not, and shall not be construed to create, any contract of employment, express or implied. Nor does this agreement in any way alter the "at-will" status of my assignment/employment.

AGREEMENT

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT; THAT I UNDERSTAND ITS TERMS; THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT; AND THAT I HAVE ENTERED INTO THE AGREEMENT AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT BY

SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO A JURY TRIAL.

I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO.

/s/ Antonio Jackson	[Redacted]
Applicant/Employment Signature	Social Security Number
/s/ Antonio Jackson	02-24-03
Print Name	Date
/s/: [Illegible]	Store Manager
Store Manager or Other Authorized Representative	Title of Representative

APPENDIX D

UNITED STATES CODE SERVICE
TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * *

§ 4 Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 *et seq.*], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided

by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX E

American Arbitration Association Commercial Arbitration Rules and Mediation Procedures
(including Procedures for Large, Complex Commercial Disputes)
Amended and Effective June 1, 2009

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

American Arbitration Association Employment Arbitration Rules and Mediation Procedures
Amended and Effective June 1, 2009

6. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

JAMS Comprehensive Arbitration Rules & Procedures
Effective July 15, 2009

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

JAMS Employment Arbitration Rules & Procedures
Effective July 15, 2009

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 17 2009
OFFICE OF THE CLERK

No. 09-497

IN THE

SUPREME COURT OF THE UNITED STATES

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENT ANTONIO JACKSON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Honorable Ninth Circuit Court of Appeals err in holding that under the facts of this case it was for the trial court and not the arbitrator to decide the threshold issue of the enforceability of the arbitration agreement?

RULE 141(b) STATEMENT OF PARTIES

Respondent incorporates by reference the Statement of Parties as set forth in the Petitioner's Petition for Writ of Certiorari.

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9 U.S.C. 2 5
42 U.S.C. 1981 2

Antonio Jackson, ("Respondent") respectfully submits the following brief in opposition to petition for writ of certiorari.

E: CITATIONS OF OPINIONS

Respondent incorporates by reference the Citations of Opinions contained in Petitioner's Petition for Writ of Certiorari.

F: STATEMENT OF JURISDICTION

Respondent incorporates by reference the Statement of Jurisdiction contained in the Petitioner's Petition for Writ of Certiorari.

G: STATUTORY PROVISIONS INVOLVED

This case involves interpretation of Sections 2 and 4 of the Federal Arbitration Act; specifically, when incorporated into an arbitration agreement containing an arbitration clause indicating that the arbitrator shall have the authority to determine the validity of the arbitration agreement, are there circumstances when the Court, and not the arbitrator, shall make that threshold determination?

H: STATEMENT OF THE CASE AND FACTS

In this case, the Respondent alleged that he was discriminated against based upon his race. He has alleged that his employer, RENT-A-CENTER, INC., failed to promote him based upon his race. (Petitioner's Appendix, pg. 1a)

Upon being hired, and the very same day, the Respondent was presented with a detailed arbitration agreement, which he signed. (Petitioner's Appendix, pg. 2a)

Based upon the repeated denials of his request for promotion, the Respondent filed a complaint in the United States District Court under 42 USC 1981. (Petitioner's Appendix, pg. 8a) The Petitioner, Rent-a-Center, Inc., moved to dismiss based on the fact that the Respondent had signed an agreement to arbitrate employment disputes when he was initially hired. (Petitioner's Appendix, pg. 8a)

The Respondent opposed the motion, claiming that the arbitration clause was unconscionable, and therefore unenforceable, and that the court, and not the arbitrator, should make that determination. The Court, however, dismissed the complaint and mandated arbitration. (Petitioner's Appendix, 9a) Appeal was taken to the Ninth Circuit Court of Appeals.

The Honorable Ninth Circuit, in the published opinion that is the subject of the instant Petition for Writ of Certiorari, reversed the determination of the District Court and found that the Court, and not the arbitrator, should make the determination as to

unconscionability. (Petitioner's Appendix, pg. 7a-20a)

Respondent takes issue with Petitioner's assertion that the intent of the parties was "clear and unmistakable," in that while one portion incorporating AAA arbitration rules indicates the arbitrator should decide arbitrability; however, the agreement also incorporates by reference sections 2 and 4 of the FAA, which clearly leaves room for a court to make the threshold determination of the viability and enforceability of the arbitration clause.

I: ARGUMENT

1. THE HONORABLE COURT HAS ALREADY SPOKEN TO THIS ISSUE AND CLEARLY SET FORTH THE PARAMETERS OF WHEN THE TRIAL COURT SHOULD MAKE THE INITIAL DETERMINATION OF THE ENFORCEABILITY OF AN AGREEMENT TO ARBITRATE AND WHEN THE ARBITRATOR SHOULD MAKE THE INITIAL DETERMINATION, AND THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT UNDER THE FACTS OF THIS CASE THE TRIAL COURT AND NOT THE ARBITRATOR SHOULD MAKE THE INITIAL DETERMINATION OF UNCONSCIONABILITY.

It is respectfully submitted that the Petitioner is incorrect in its assertion that there is a split amongst the circuit courts of appeal regarding who makes the threshold determination as to the enforceability of an arbitration agreement, even when

the parties have contracted that the arbitrator shall make the determination.

The Honorable Panel of the Ninth Circuit correctly analyzed this case by citing to United States Supreme Court precedent and Ninth Circuit cases following that precedent. There is no real conflict amongst the circuits on the issue raised in the instant Petition for Writ of Certiorari.

The trial court, in reliance on the U.S. Supreme Court case of *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204 (2006), found that it is up to the arbitrator to decide if the arbitration agreement in question is enforceable.

The trial court, however, completely misconstrued the *Buckeye* decision. The Ninth Circuit recently had opportunity to address the *Buckeye* holding in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), in which the Court stated the following:

> Neither party questioned whether a court-as opposed to an arbitrator-should decide whether the DRP is unconscionable. The Ninth Circuit, sitting en banc and applying *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), recently addressed whether challenges to an arbitration clause or agreement should be decided by a court or an arbitrator. See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc). "When the crux of the complaint is not the invalidity of the

> contract as a whole, but rather the arbitration provision itself, then the federal courts [as opposed to the arbitrator] must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 [.]" *Id.* at 1264. The arbitration agreement challenged in this case is only part of the many conditions and terms of Davis's employment relationship with O'Melveny. Striking or upholding the arbitration agreement or severing any of its terms would not otherwise affect the legality of other conditions of her employment. Under Nagrampa, then, the question whether O'Melveny's arbitration agreement is unconscionable is for a court to decide. See *id.*; *cf. Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 264-65 (3d Cir. 2003) (exemplifying that a court addresses the unconscionability of an arbitration provision in a suit regarding employment disputes), cited with approval in *Nagrampa*, 469 F.3d at 1271-72.

Exactly like the Plaintiff in the *Davis* decision, striking or upholding the arbitration agreement or severing any of its terms would not otherwise affect the legality of the conditions of the Respondent's employment, an at-will employee.

The trial court erred by looking to the arbitration agreement and not to the employment agreement as a whole as is required under *Buckeye*. The agreement to arbitrate was but one provision of the Respondent's employment arrangement with the Petitioner. The Respondent only challenged the validity of the agreement to arbitrate. Further, the fact that this unenforceable arbitration agreement also includes a provision that the arbitrator is to decide the validity of the arbitration agreement does not change the analysis set forth in the *Buckeye* decision as to the validity of this clause.

As such, it was clearly within the province of the trial court to rule on the validity of the agreement to arbitrate, and the Ninth Circuit did not err in so holding.

Further, there is no conflict among the circuits as claimed by the petitioner. The first case cited by the Petitioner as being inconsistent with the Ninth Circuit is *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005). It is respectfully submitted that the *Terminix* decision is wholly consistent with the Ninth Circuit and United States Supreme Court precedent.

> The Supreme Court has recently reaffirmed that the question "whether the parties have a valid arbitration agreement at all" is for the court, not the arbitrator, to decide. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 2407, 156 L.Ed.2d 414 (2003) (plurality opinion). This rule makes

> imminent sense, for in the absence of "clear and unmistakable evidence" that the parties intended the arbitrator to rule on the validity of the arbitration agreement itself.

(*Id.*, at 1332)

First of all, there is no such clear and unmistakable evidence in that the agreement to arbitrate also incorporates sections 2 and 4 of the Federal Arbitration Act, which does leave room for the court to make the threshold determination of arbitrability. Additionally, as the Ninth Circuit pointed out in discussing this decision, the case is easily distinguishable in that unlike the instant matter, the *Terminix* decision contained no allegations that the agreement to arbitrate was made under circumstances of grossly unequal bargaining power and that there was no meaningful agreement to arbitrate in the first instance, which would be a matter for the court to decide, as it was in the Jackson case. (*Jackson v. Rent-a-Center,* Petitioner's Appendix, pg. 16a)

The Petitioner next cites to *Bailey v. Ameriquest Mortgage Co.,* 346 F.3d 821 (8th Cir. 2003) as being inconsistent with the Ninth Circuit holding. However, *Bailey* is also difficult for the Petitioner in that it relies upon *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415 (1986), which clearly indicates it is for the court to decide arbitrability:

> It is the court's duty to interpret

> the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

(*Id.*, at 651)

Even the *Bailey* court recognized its unique jurisdiction to address the validity of an arbitration clause when fraud or overwhelming economic power is present. Clearly, the Respondent set forth the overwhelming economic power of the Petitioner in the opposition to the motion to compel arbitration.

The Petitioner finally attempts to show a conflict among the circuits by citing to *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009). This case also presents a problem for the Petitioner in that ultimately, the court held it was, indeed, for the court to decide, and not the arbitrator, if the remedy of arbitration was illusory, which is a sub-category of the broader unconscionability argument.

Further, while there may be some public policy arguments in favor of arbitration, there are strong

public policy arguments that militate against allowing the arbitrator to determine arbitrability. The first, for example, is the fact that the arbitrator has a financial interest in finding an arbitration clause to be enforceable. (See New York University Law Review, Vol. 83, No. 5, "The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law," by Assistant Professor Aaron-Andrew P. Bruhl, pg. 1472)

In addition, to the extent that an arbitration agreement does contain unconscionable provisions, courts routinely refuse to enforce contracts that violate public policy, and contrary to the position taken by the Petitioner and *Amicus Curiae* Pacific Legal Foundation, parties are not free to contract in a manner that violates public policy. (See, for example, *Corn Plus Co-op. v. Continental Cas. Co.*, 516 F.3d 674 (8th Cir. 2008), in which the court recognized the freedom of parties to contract as long as they do not violate public policy.)

J: CONCLUSION

Respondent respectfully submits that the decision of the Ninth Circuit should not be disturbed. Contrary to the assertions of the Petitioner and *Amicus Curiae*, there is no split among the circuits on the issue of who should decide arbitrability. As such, the Petition for Writ of Certiorari should be denied.

DATED this 17th day of December, 2009.

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REPLY BRIEF

Supreme Court, U.S.
FILED
JAN 7 - 2010
OFFICE OF THE CLERK

No. 09-497

IN THE
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RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Rent-A-Center, West, Inc. ("Petitioner" or "RAC") submits this Reply Brief to address new points raised in the Opposition to Petition for Writ of Certiorari ("Opp. Br.") filed by Respondent Antonio Jackson ("Jackson" or "Respondent"). Sup. Ct. R. 15.6.

In his opposition brief, Respondent completely omits reference to the seminal case upon which the petition for writ of certiorari is largely based, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("*First Options*"). In *First Options*, this Court held that arbitration agreements which clearly and unmistakably evince the parties' intent to assign the

determination of arbitrability to the arbitrator and not the district court are fully enforceable. *Id.* at 943-44. Rather than addressing the application of *First Options* to this case, Respondent makes arguments in his opposition brief that are either not germane to the issues raised by the petition, ignore the current circuit split or, upon close examination, actually support a grant of the petition.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE IN THIS CASE IS WHETHER THE RULE OF *FIRST OPTIONS* APPLIES TO ARBITRAL DETERMINATIONS OF UNCONSCIONABILITY.

By not discussing *First Options* in his opposition brief, Respondent fails to address the legal issue posed by this case. The general rule in the absence of the parties' agreement to the contrary is that issues of arbitrability are to be decided by the court. *First Options*, 514 U.S. at 945. However, where, as here, the parties have clearly and unmistakably agreed "to submit the arbitrability question itself to arbitration," there is an exception to the general rule and the parties' agreement to vest the arbitrator with the authority to determine arbitrability must be enforced. *Id.* at 943-45.

The question in this case is whether the exception to the general rule set forth in *First Options* applies to the determination of contract validity based on alleged unconscionability. The Ninth Circuit has ruled, in contrast to every other circuit court of appeals that has considered the question, that the exception simply cannot apply "where a party specifically challenges arbitration provisions as unconscion-

able and hence invalid." (App., 17a-18a.) The Ninth Circuit thus issued a blanket rule that "where, as here, an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter." (App., 18a.) The issue posed by this petition is whether this blanket rule is in accordance with the FAA, this Court's precedents and federal arbitration policy. RAC contends that it is not.

II. THE RESPONSE DOES NOT MEANINGFULLY ADDRESS THE CENTRAL ISSUE OF THE CASE.

Rather than addressing the Ninth Circuit's refusal to extend the principle of party autonomy applied by this Court in *First Options* to determinations of contract validity, Respondent makes arguments in his opposition brief that are not responsive to the issue posed herein. For example, Respondent erroneously contends that this Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) ("*Buckeye*"), controls whether the contractual provision authorizing the arbitrator to determine contract validity in this case is enforceable. (Opp. Br., pp. 3-6.) However, *Buckeye* and the case upon which Buckeye relied, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), declare only the general default rules that allocate arbitral and court jurisdiction *in the absence of any agreement to the contrary*. Respondent points to nothing in either case which would support the notion that the parties cannot "clearly and unmistakably" agree to vary these general default rules. In short, the *First*

Options exception was not addressed by the Court in those cases. In this case, *First Options* is front and center.

Similarly, Respondent's invocation of sections 2 and 4 of the FAA, 9 U.S.C. § 2 and § 4, misses the point. In his opposition brief, Respondent contends that these statutory provisions "leave room for the court to make the threshold determination of arbitrability." (Opp. Br., p. 7.) However, in making this statement, Respondent does not address the issue settled in *First Options*: that parties to an arbitration agreement may agree to alter the role of the reviewing court as prescribed in the FAA and to allow the arbitrator to determine arbitrability issues in the first instance. *First Options*, 514 U.S. at 943.

Nothing in sections 2 or 4 is to the contrary. Section 2 merely states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And while section 4 might permit a party to defend against a petition to compel arbitration by arguing issues relating to the "making of the agreement for arbitration," the Court in *First Options* expressly recognized that this opportunity "simply does not say anything" about whether the parties agreed to be bound by the arbitrator's determination of arbitrability. *First Options*, 514 U.S. at 946. Sections 2 and 4 of the FAA thus do not, individually or in concert, negate the parties' agreement to vest the arbitrator with the power to determine arbitrability.[1]

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[1] Substantial authority exists for the principle that allegations of unconscionability do not go to the "making of the agreement for arbitration" within the meaning of section 4. *See* Petition, p. 14 n.5 (cases cited).

Respondent's further contention that the Agreement's incorporation of the FAA somehow renders the parties' commitment of arbitrability issues to the arbitrator less than "clear and unmistakable" must be rejected. (Opp. Br., pp. 3, 7.) Respondent ignores the fact that *First Options* was decided in accordance with FAA principles: "In this case, we consider two questions about how courts should review certain matters *under the Federal Arbitration Act* * * *." *First Options*, 514 U.S. at 940 (emphasis added). The case came down to whether the parties clearly and unmistakably committed arbitrability to the arbitrator. *Id.* at 947. Likewise, the Agreement here states that *"[e]xcept as provided in this Agreement*, the Federal Arbitration Act shall govern interpretation, enforcement, and all proceedings pursuant to this Agreement." (App., 25a (emphasis added).) Thus, as in *First Options*, provisions of the FAA may be varied by the express provisions of the Agreement. As the Ninth Circuit put it, "Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator." (App., 13a.) Jackson's current protestation to the contrary is "too little, too late."

III. THERE IS A CLEAR SPLIT IN THE CIRCUITS REGARDING THE ISSUE IN THIS CASE.

Respondent's failure to address *First Options* causes him to erroneously claim that there is no circuit split. (Opp. Br., pp. 6-8.) However, RAC cited *inter alia* cases from the Eighth and Eleventh Circuit Courts of Appeals holding, contrary to the Ninth Circuit's ruling in this case, that, under clear and unmistakable language such as is present here,

arbitrators possess the authority to determine issues of contract validity and enforceability, including issues of alleged unconscionability. *See, e.g., Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623 (8th Cir. 2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003). RAC also cited *Awuah c. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009), in which the First Circuit Court of Appeals held that, unless the arbitral remedy was "truly illusory," an issue not present in this case, clear and unmistakable language could properly reserve for the arbitrator and not the court all issues regarding contract validity including unconscionability. *Id.* at 13.

Respondent's contention that there is no conflict among the circuits depends on a constrained and selective reading of some, but not all, of the cases relied upon by RAC. For the most part, Respondent cites cases only for their recitation of the general rule that courts ordinarily determine the validity of an arbitration agreement, while ignoring their further and central holdings regarding the exception to the general rule set forth in *First Options*. For example, Respondent misquotes a preliminary passage from *Terminix* and then proceeds to ignore the central holding of the case: that the parties had "contracted around" the general rule by assigning *all issues* of contract validity to the arbitrator, including those relating to the validity of the remedial restrictions that were being challenged. *See* Opp. Br., pp. 6-7

(misquoted passage from case); *Terminix*, 432 F.3d at 1332-33 (summarizing holding of case).[2]

Respondent's attempt to distinguish the Eighth Circuit's decision in *Bailey* is similarly unavailing. Again, rather than focusing on the holding of the case, Respondent notes that the court in *Bailey* relied upon *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and then quotes *AT&T* for the general rule that courts ordinarily determine issues of arbitrability. (Opp. Br., pp. 7-8.) However, *Bailey* cited *AT&T not* for the general rule but for the same exception to the general rule recognized in *First Options*: "that issues of arbitrability are to be decided by the arbitrator in the first instance if the agreement to arbitrate 'clearly and unmistakably' so provides." *Bailey*, 346 F.3d at 824, quoting *AT&T*, 475 U.S. at 649.

Respondent's claim that there is no conflict between the Ninth Circuit's blanket ruling in this case and the First Circuit's holding in *Awuah* is also misplaced. The Ninth Circuit has ruled herein that, irrespective of the parties' clear and unmistakable agreement to the contrary, any "dispute as to whether the agreement to arbitrate arbitrability is

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[2] Respondent seeks to further distinguish *Terminix* on the grounds that there was no allegation in that case that the arbitration agreement was "made under circumstances of grossly unequal bargaining power * * *." (Opp. Br., p. 7.) However, *Terminix* did not limit in any way the types of contract validity issues that were subject to arbitral decision according to the agreement of the parties. The objection to the remedial restrictions in that case constituted a claim of substantive unconscionability. Respondent offers no explanation why substantive unconscionability can properly be decided by an arbitrator but procedural unconscionability cannot.

itself enforceable is nonetheless for the court to decide as a threshold matter." (App., 18a.) Under the Ninth Circuit's formulation, any claim of unconscionability, even a claim limited to substantively unfair terms without any unequal bargaining power, would be reserved for the court. The Ninth Circuit requires only the lowest of hurdles: a *bald claim* of any type of unconscionability. The First Circuit, on the other hand, honors the parties' agreement vesting the arbitrator with the authority to determine contract validity, including claims of unconscionability, except if the party opposing arbitration can surmount the highest of hurdles: demonstrating that the arbitration remedy is "truly illusory" so that obtaining an arbitrator's decision on the issue would be "impossibly burdensome." *Awuah*, 554 F.3d at 12-13. The Ninth Circuit stands alone in holding that a mere claim of unconscionability is sufficient to upset the parties' clear and unmistakable intentions. To contend that the divergent views of the First and Ninth Circuits do not constitute a circuit split begs credulity.

IV. RESPONDENT'S REFERENCE TO STRONG POLICY ARGUMENTS IN HIS FAVOR SUPPORTS THE PETITION.

Respondent's claim that "there are strong public policy arguments that militate against allowing the arbitrator to determine arbitrability" only enhances the argument for granting this petition. (Opp. Br., pp. 8-9.) Respondent's arguments regarding an arbitrator's "financial interest in finding an arbitration clause to be enforceable" betrays a suspicion of arbitration that would greatly impact this entire area of law. (Opp. Br., p. 9.) *See Green Tree Fin. Corp.-Ala.*

v. Randolph, 531 U.S. 79, 89 (2000) (courts must reject "generalized attacks" that "rest on suspicion of arbitration").

For example, if it were the law that arbitrators should not be trusted to rule on the validity of an arbitration agreement because of financial self-interest, then perhaps they also should not be trusted to rule on a dispositive motion even where the governing rules so provide because, in Respondent's view, granting such a motion would end the case, eliminating the need for a full trial-type hearing, and thus limiting the arbitrator's potential fees. *See, e.g., Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (under NASD rules, dispositive motions available in arbitration). Perhaps, if Respondent's view prevails, arbitrators would not be trusted with such motions, and courts would have to decide them.

RAC disagrees with Respondent's public policy arguments on their merits because arbitrators are well-equipped to decide issues of arbitrability, including claims of unconscionability. However, the mere presence of Respondent's public policy arguments underscores the importance of this case and provides additional support for a grant of the petition for writ of certiorari.

CONCLUSION

There is a clear split among the Circuit Courts of Appeals on the important issue posed by this case. The Ninth Circuit stands alone among the circuits in holding that, despite the clear and unmistakable terms of the parties' agreement, claims of contract invalidity, including even the most tenuous claims of unconscionability, must be decided *in all cases* by the district court and can never be decided by an arbitrator. This Court should grant the petition for a writ of certiorari in this case to resolve the current circuit split on this issue and ensure the consistent and uniform application of the FAA throughout the nation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act (FAA) is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Athens Disposal Co. v. Franco*, docket no. 09-272; *Stolt-Nielsen S.A., et al. v. Animalfeeds Int'l Corp.*, docket no. 08-1198; *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores Inc. v. Gentry*, 128 S. Ct. 1743 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The purpose behind the Federal Arbitration Act (FAA) is to preserve and promote the right to contractual choice. It is not to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. Such contracts are the product of the parties' own assessments of their costs and benefits, and as no third party is in a better position to decide whether the benefits outweigh the costs, the parties' own judgment deserves respect. In this case, the parties clearly and unmistakably agreed that an arbitrator would resolve all disputes arising out of their employment relationship, including such gateway issues as whether the contract itself is unconscionable. *Jackson v. Rent-A-Center West Inc.*, 581 F.3d 912, 917 (9th Cir. 2009) ("Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator.").

The Ninth Circuit decision below, resting on a mere allegation of unconscionability to invalidate an arbitration contract and further announcing that *any* party in *any* case need not do more to invoke a court's jurisdiction, stands in stark contrast with this Court's jurisprudence and promises to undermine the enforceability of untold thousands of arbitration agreements throughout the western United States. For the reasons set forth below, the petition for writ of certiorari should be granted.

ARGUMENT

I

THIS CASE IMPLICATES FREEDOM OF CONTRACT CONCERNS BEYOND ARBITRATION IN THE EMPLOYMENT CONTEXT

A. The FAA Is Premised on Freedom of Contract

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties."

United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960) (citations omitted). The FAA, as the statute embodying this stance, "establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). As such, the FAA institutes default rules for arbitration.

Default rules ensure that if parties forget to include certain terms in their contracts, those contracts still will be enforced using statutory "gap fillers" that

are designed to mimic what contracting parties would have wanted, had they considered the subject. *See, e.g.*, U.C.C. § 2-305 (1998) (allowing parties to contract even where no price term has been determined). The law allows parties to waive these rules because

> a meaningful power of exit is one important component of the concept of political freedom . . . . [A] person who may not "opt out" of a social arrangement is, to this extent, unfree . . . . [G]enuine consent implies the existence of meaningful alternatives . . . [and] in a free society, persons should have the power and right to contract around the background rules supplied by a legal system.

See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 904 (1992). *See also* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 421 (2003) (Legislatures should "make a particular rule a mandatory rule only if one of the parties to the contract is unable to protect itself from the other, or if the contract has effects on third parties who are unable to protect themselves. Otherwise, the rule should be a default rule."); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 230 (1997) ("[T]he statute's default allocation of authority between courts and arbitrators need not implicate in any way the power of the parties themselves to structure the arbitration mechanism so as to advance their own interests.").

Given this "power to exit," contracting parties will tend to choose terms which suit their needs; this improves efficiency by ensuring that parties do not

have their hands tied by provisions which they do not want. Contracting around default rules can be costly, but prohibiting parties from doing this can be even costlier. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L. J. 389, 402 (1993) ("[T]he state's choice of a default rule cannot affect the substance of private contracts . . . . [but] will affect total contracting costs."). Where there is no social harm to be anticipated, or where that harm can be addressed by less intrusive means, parties should be free to negotiate to accomplish the things they wish to do, including determining the method of adjudicating possible future disputes. In short, "freedom of contract is the general rule and restraint the exception." *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932). In determining the validity of limits on the right to contract, "regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests [that courts will refuse to enforce them]." *Id.*

These principles apply to arbitration agreements as well. As this Court recognized in *Volt Information Sci., Inc. v. Bd. of Trus. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," because this is consistent with the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." Because arbitration is a matter of contract, the parties to a dispute "are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they

specify by contract the rules under which that arbitration will be conducted." *Id.* The FAA wisely *fosters*, but does not *dictate* agreements between private parties. It provides default rules that the parties may waive in order to bring their own preferences and knowledge to bear on a problem.

B. The Sweeping Ninth Circuit Decision Encourages Even Sophisticated Parties To Cry "Unconscionable!" To Invalidate Arbitration Contracts

Noting that "as a matter of federal arbitration law, a court may not compel arbitration until it is 'satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,'" *Jackson*, 581 F.3d at 916 (citation omitted), the court below held, "that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." *Id.* Nothing in the sweeping language of this decision would restrict its holding only to employment contracts, or those in the consumer context (two areas in which one party to the contract is assumed to have greater knowledge and sophistication of legal remedies).

Instead, the Ninth Circuit decision could just as easily void arbitration contracts between two businesses, or other equally sophisticated parties, in conflict with the general approach. *See, e.g., Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (upholding a private contractual agreement not to sue in any court other than the High Court of Justice in London where this choice "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and

absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (involving an international business deal between sophisticated executives and approving an agreement waiving review of an arbitrator's decision); *China Resource Prods. (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 747 F. Supp. 1101, 1107 (D. Del. 1990) (upholding an arbitration in China due to sophistication of parties); *Tenn. Imp., Inc. v. Filippi*, 745 F. Supp. 1314, 1326-28 (M.D. Tenn. 1990) (finding arbitration in Italy for American company not unconscionable, because the American company was a sophisticated business with international experience and could not show any unfair lack of bargaining power).

Even employment disputes may involve highly sophisticated executives in conflict with their companies. "[S]o long as something qualifies as 'arbitration' in the United States, the governing law does not meaningfully distinguish arbitrations between commercially sophisticated parties and arbitrations between parties with distinctly different bargaining positions." Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189, 1233 (2008).[2] *See also*

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[2] Nor should courts attempt to make such a distinction. Such a regime

> would wreak havoc as courts would be forced to decide which of the two "boxes" a particular arrangement fell under. Nor could one be assured that courts could easily and fairly classify contracts as among "sophisticated" parties versus "unsophisticated" parties. An arbitration agreement between General Electric and a Hungarian start-up company may reflect a far greater relative inequality in bargaining power than, for example, a

(continued...)

Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol'y 578, 587-88 (2000) ("[C]ourts that decide not to enforce arbitration agreements, . . . can impose costs on the parties. Courts can't just hold something unconscionable without consequences. Given that sophisticated parties find these arbitration agreements beneficial, it seems to me that there is evidence that they may be beneficial to unsophisticated parties as well.").

C. Public Policy Supports Allowing Parties, Wherever They Stand on the Spectrum of Sophistication, To Customize Arbitration To Resolve Their Disputes

The decision below significantly undermines the parties' choice whether to accept default rules or to customize dispute resolution procedures to best suit their needs. "Default" rules are simply intended to provide terms that are acceptable to the greatest number of people, so that those who forget or who choose to omit a provision will have the default provision incorporated into the contract. *See, e.g.*, *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617-18 (2d Cir. 2001) ("When interpreting a state law

---

[2] (...continued)
contract between a local merchant and a sophisticated investor. Thus, at best, the consumer-contract criticism would yield a world that is over-inclusive and under-inclusive. At worst, it would yield an uncertain world in which neither courts nor parties could be certain whether a particular agreement qualified for commercially sophisticated treatment.

Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151, 198 (2004).

contract, therefore, an established definition provided by state law or industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning."). But default rules by themselves are neither better nor worse than customized rules. There is nothing exceptional about a three-arbitrator panel rather than a single arbitrator, for example.

Moreover, as a matter of public policy, allowing parties to negotiate around default rules increases efficiency by ensuring that parties are not given costly overprotection, or deprived of protections that they desire. Requiring parties to abide by unwanted terms in a contract will in many cases cost more than their agreement to waive those default protections, and whenever this happens, parties will contract around those rules. "A law of contract not based on [such] efficiency considerations will therefore be largely futile." Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 89 (1977).

The decision below, which undermines the ability of parties to tailor their agreements in all contexts, may be particularly onerous to commercial enterprises and others conducting transactions in cyberspace. Private arbitration systems are favored for business over the Internet because the arbitrations tend to be less time-consuming and more responsive to the needs of the consumers themselves; the judges tend to be more expert in the relevant trade; and the parties themselves can decide upon the terms for dispute resolution. *See* Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace*

Law, 41 Santa Clara L. Rev. 837, 838 (2001) (discussing development of alternative forms of dispute resolution solely for cyberspace).

The Ninth Circuit decision threatens to derail arbitration contracts in all contexts, whenever a party to an explicit agreement simply alleges unconscionability. Because this threat goes to the heart of the FAA and this Court's jurisprudence approving arbitration as a legitimate alternative means of dispute resolution, the petition for a writ of certiorari should be granted.

II

THE NINTH CIRCUIT DECISION IS BASED ON ILLEGITIMATE SUSPICION OF ARBITRATION AS A METHOD OF RESOLVING DISPUTES

The Ninth Circuit's decision treats a claim of unconscionability less as an allegation than an incantation—the mere utterance of the word and poof! the contract terms disappear. In no other context is a mere allegation, devoid of evidence, sufficient to dramatically alter the course of dispute resolution. *See e.g., Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (Upholding dismissal of Jones Act claim, noting that "if a defendant files a 'speaking motion' to dismiss for lack of subject matter jurisdiction, as appellees did here, the plaintiff 'cannot rest on the mere assertion that factual issues can exist.' He must come forward with evidence outside his pleadings to support his jurisdictional allegation.") (citation omitted); *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984) ("[I]n establishing in personam jurisdiction, Time

Share had a burden of proof to sustain, and thus mere affidavits which parrot and do no more than restate plaintiff's allegations without identification of particular defendants and without factual content do not end the inquiry. Here, we find that Time Share's affidavit simply failed to prove any defendant's contacts with the forum state.").

Why, then, does the Ninth Circuit single out arbitration contracts as particularly vulnerable to claims of unconscionability? The majority opinion reflects that the court simply distrusts arbitrators to decide the question, and assumes that an arbitrator would find that the parties agreed to arbitrate. Yet there is no solid basis for this assumption. Arbitrating a challenge to the existence of an arbitration agreement does not necessarily keep the parties in arbitration, but rather establishes the initial venue to address that challenge. *See e.g.*, *Metal Prods. Workers Union v. Torrington Co.*, 242 F. Supp. 813 (D. Conn. 1965), *aff'd* 358 F.2d 103 (2d Cir. 1966) (court rejected petitioner-union's request to vacate arbitrator's decision that recall of discharged employees was not arbitrable, so as to reopen a grievance involving a particular employee that it would have liked to submit to arbitration); *Aircraft Braking Systems Corp. v. Local 856, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers*, 97 F.3d 155, 162 (6th Cir. 1996) (arbitrator initially found that the grievance was "not arbitrable" because there was no enforceable agreement, and that "neither the Company nor the Union intended to be contractually bound"); *In Re E-Systems, Inc.*, 86 Lab. Arb. 441, 446 (1986) (arbitrator held that a grievance filed on behalf of retirees protesting changes in insurance coverage was not arbitrable because retirees are not "employees").

If the arbitrator finds the contract to be unconscionable, then the dispute will not proceed in arbitration. "[I]n all cases the disappointed claimant can go immediately to a court (under § 4 of the FAA) to seek an order compelling arbitration under the terms of what he still believes to be an enforceable arbitration agreement covering the dispute." Alan Scott Rau, *"The Arbitrability Question Itself,"* 10 Am. Rev. Int'l Arb. 287, 353 (1999). This is analogous to litigating subject-matter jurisdiction in federal court under the Federal Rules of Civil Procedure. Fed. Rule Civ. Proc. 12(b)(1). The district courts exercise at least temporary jurisdiction over the parties, even when a defendant disputes whether the case belongs in federal court at all. *Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir. 1953) (district court has jurisdiction to determine its own jurisdiction on ground of a federal question, and appellate court has jurisdiction to review and reverse, modify, or affirm the district court's decision) (citing 28 U.S.C. § 2106). "A successful defendant will litigate the case out of court, just as a party can arbitrate the case out of arbitration." Stuart M. Widman, *What's Certain Is the Lack of Certainty about Who Decides the Existence of the Arbitration Agreement*, 59-JUL Disp. Resol. J. 54, 58-59 (2004).

Most importantly, courts may not harbor suspicion against an arbitral forum, just because arbitration operates under procedures that differ from court rules. This Court's very recent decision *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (holding that a provision in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate statutory discrimination claims was enforceable as matter of federal law) plainly requires judges to respect

the arbitration process. In so doing, the Court rejected the broad dicta in the *Gardner-Denver* line of cases that criticized the use of arbitration for the vindication of statutory antidiscrimination rights. *Id.* at 1469. The Court recounted holdings of recent vintage rejecting judicial hostility to arbitration. *Id.* at 1471 (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[A]rbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and that "there is no reason to assume at the outset that arbitrators will not follow the law.") and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.")). Affirming this position, the Court concluded:

> An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." In any event, "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims

> that we have found to be arbitrable, such as RICO and antitrust claims." At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.

14 Penn Plaza, 120 S. Ct. at 1471 (citations omitted). It is hard to fathom justification behind the Ninth Circuit's decision in this case that does not center on "objections centered on the nature of arbitration." As such, the decision fails to abide by the FAA and undermines the parties' freedom of contract for no legitimate reason.

CONCLUSION

The petition for writ of certiorari should be *granted*.

DATED: November, 2009.

Respectfully submitted,

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JOINT APPENDIX

(5)

No. 09-497

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IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

03:07-cv-00050-LRH (RAM)

ANTONIO JACKSON,
Plaintiff,

v.

RENT-A-CENTER WEST, INC.,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/01/2007	1	COMPLAINT *and Jury Demand* against Rent-A-Center West, Inc. (Filing fee $350 receipt number 471003), filed by Antonio Jackson. Certificate of Interested Parties due by 2/11/2007. (Attachments: #1 Civil Cover Sheet #2 Summons)(Silverberg, Ian) Modified on 2/2/2007 (DRM,) to reflect Summons Issued 2/2/2007. (Entered: 02/01/2007)
03/14/2007	6	MOTION to Dismiss *Proceedings and Compel Arbitration* by Defendant Rent-A-Center West, Inc.. Responses due by 4/1/2007. (Attachments: #1 Declaration of Steven A. Spratt #2 Exhibit 1)(Fulstone, Suellen) (Entered: 03/14/2007)

DATE	NO.	PROCEEDINGS
03/20/2007	7	RESPONSE to 6 MOTION to Dismiss *Proceedings and Compel Arbitration*, 5 MOTION to Dismiss *Proceedings and Compel Arbitration and Motion for Attorneys' Fees*; filed by Plaintiff Antonio Jackson. Replies due by 4/3/2007. (Silverberg, Ian) (Entered: 03/20/2007)
04/03/2007	8	REPLY to Response to 6 MOTION to Dismiss Proceedings and Compel Arbitration; filed by Defendant Rent-A-Center West, Inc.. (Attachments: #1 Exhibit 2 and 3)(Fulstone, Suellen) (Entered: 04/03/2007)
06/07/2007	12	ORDER GRANTING D's 6 Motion to Dismiss Proceedings and Compel Arbitration. FURTHER ORD that D's 6 request for attorney's fees is DENIED. Signed by Judge Larry R. Hicks on 6/6/2007. See ord for spec. (DRM,) (Entered: 06/07/2007)
06/07/2007	13	JUDGMENT in favor of Defendant against Plaintiff. Signed by Clerk Lance S. Wilson on 6/7/207. (DRM,) (Entered: 06/07/2007)
06/22/2007	14	NOTICE OF APPEAL as to 12 Order on Motion to Dismiss by Plaintiff Antonio Jackson. Filing fee $455, receipt number 597436. (Silverberg, Ian) (Entered: 06/22/2007)

DATE	NO.	PROCEEDINGS
06/25/2007	15	AMENDED NOTICE OF APPEAL as to 14 Notice of Appeal by Plaintiff Antonio Jackson (*corrected*). (Silverberg, Ian) (Entered: 06/25/2007)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16164
D.C. No. CV-07-00050-LRH/RAM

ANTONIO JACKSON,
Plaintiff-Appellant,

v.

RENT-A-CENTER WEST, INC.,
Defendant-Appellee.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/06/2007	3	Filed original and 15 copies Appellant Antonio Jackson opening brief (Informal: no) 10 pages and five excerpts of record in 1 vol; served on 8/3/07 [07-16164] (CW)
09/24/2007	6	Filed original and 15 copies appellee Rent-A-Center West 38 pages brief, ; served on 9/21/07 [07-16164] (CW)
10/10/2008	22	Filed clerk order (Deputy Clerk:BJB): the Court orders this case submitted on the briefs and records, without oral argument, on Friday, November 21, 2008, at San Francisco, California, pursuant to Fed. R. App. P. 34(a). (BJB)

DATE	NO.	PROCEEDINGS
11/21/2008	23	SUBMITTED ON THE BRIEFS TO CYNTHIA HOLCOMB HALL, THOMAS G. NELSON and SIDNEY R. THOMAS [07-16164, 06-17133] (ER)
09/09/2009	24	FILED OPINION (CYNTHIA HOLCOMB HALL, THOMAS G. NELSON and SIDNEY R. THOMAS) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal. Judge: CHH Dissenting, Judge: SRT Authoring, FILED AND ENTERED JUDGMENT. [7055139] (RP)
09/21/2009	26	Filed (ECF) Appellee Rent-A-Center West, Inc. Motion to stay the mandate. Date of service: 09/21/2009. [7068812] (MTG)
09/25/2009	27	Filed (ECF) Appellant Antonio Jackson response opposing motion (Motion (ECF Filing), Motion (ECF Filing) motion to stay the mandate). Date of service: 09/25/2009. [7075154] (IS)
09/28/2009	28	Filed order (SIDNEY R. THOMAS) The appellee's motion to stay the mandate is GRANTED. The issuance of the mandate shall be stayed for ninety (90) days from the date of this order. [7076666] (SC)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 02/01/07]

Case No.

ANTONIO JACKSON

Plaintiff,

vs.

RENT-A-CENTER WEST, INC.,

Defendant.

COMPLAINT AND JURY DEMAND
(42 USC § 1981 - Racial Discrimination)

COMES NOW the Plaintiff, ANTONIO JACKSON, by and through Counsel, Ian E. Silverberg, Esq., and Hardy Law Group, and for causes of action against the Defendant does hereby allege the following:

I

JURISDICTIONAL ALLEGATIONS

1. The Plaintiff is an adult, competent African-American male, who resides in the County of Washoe, State of Nevada, and brings this case pursuant to 42 USC § 1981.

2. The Defendant is a corporation licensed to do business in the County of Washoe, State of Nevada, and doing business as Rent-A-Center in Washoe County, Nevada, employing more than 15 employees.

II

FACTUAL ALLEGATIONS

3. The Plaintiff began working for the Defendant on or about June 1, 2004, as an account manager.

4. The Plaintiff performed his job in accordance with the standards required by the defendant.

5. On multiple occasions the Plaintiff sought to be promoted to the position of sales in and out manager.

6. Despite these attempts, the Plaintiff was repeatedly refused promotion while other non-African-American employees with less seniority were promoted over him.

7. The Plaintiff complained to his store manager and other store managers, but to no avail.

8. Rather than promoting the Plaintiff, the Plaintiff suffered retaliation in the form of suspensions without cause, transfer to a less desirable location and ultimately termination.

9. The Plaintiff also called the corporate office, human resources, on many occasions. Human resources finally called the Plaintiff, but this was at work. The Plaintiff asked that he be contacted at home and never was.

10. The Plaintiff also filled out three separate reports about the discrimination but no action was taken.

11. The Plaintiff was ultimately given the promotion, but he was then terminated within two months of the promotion without cause.

12. In addition to the failure to promoted, the Plaintiff's manager made a racially hostile comment

to the effect that he would not promote the Plaintiff due to his race, to a customer who informed the Plaintiff of the comment.

13. The Plaintiff suffered damages in wage and benefit differential, as well as humiliation and emotional distress as a direct and proximate result of the discriminatory treatment he received.

FIRST CAUSE OF ACTION

(Racial Discrimination - Failure to Promote)

14. The Plaintiff hereby incorporates by reference paragraphs 1-13 of this Complaint as if fully set forth herein.

15. The acts and omissions of the Defendant as set forth herein are in violation of the Plaintiff's federally protected rights in that he was denied promotion based solely upon his race.

16. As a direct and proximate result, the Plaintiff has suffered damages as set forth herein and in an amount to be proved at trial.

SECOND CAUSE OF ACTION

(Retaliation)

17. Plaintiff hereby incorporates by reference paragraphs 1-16 of this Complaint as if fully set forth herein.

18. Plaintiff engaged in a protected activity by complaining on multiple occasions about the failure to promote based on his race.

19. The Plaintiff suffered adverse employment actions by being transferred to a less desirable location and ultimately terminated.

20. As a direct and proximate result, the Plaintiff has suffered damages as set forth herein and in an amount to be proved at trial.

WHEREFORE, Plaintiff respectfully requests the following relief:

1. Compensatory damages to be proved at trial;
2. Special damages according to proof;
3. Punitive damages;
4. Attorney's fees and costs; and,
5. For any further relief the Court may consider appropriate.
6. In addition to the above, the Plaintiff requests a jury to hear this matter.

DATED this 1st day of February, 2007.

/s/ Ian E. Silverberg, Esq.
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 03/14/07]

Case No. 3:07-CV-00050-LRH-RAM

ANTONIO JACKSON,

Plaintiff,

vs.

RENT-A-CENTER WEST, INC.,

Defendant.

MOTION TO DISMISS PROCEEDINGS AND COMPEL ARBITRATION

Defendant Rent-A-Center West, Inc. ("Defendant" or "RAC"), by and through its counsel, hereby moves this Court to dismiss this proceeding and compel arbitration, and award Defendant attorneys' fees for the filing of this motion.

This Motion is made and based upon the accompanying Memorandum of Points and Authorities, the Declaration of Steven A. Spratt, the exhibits attached hereto, all pleadings and papers on file herein, as well as any argument which this Court may entertain.

Dated: March 13, 2007 LITTLER MENDELSON

By: /s/
SUELLEN FULSTONE, ESQ.
Attorneys for Defendant
RENT-A-CENTER WEST, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On or about February 1, 2007, Plaintiff Antonio Jackson ("Plaintiff" or "Jackson"), a former employee of RAC, filed a Complaint alleging race discrimination and retaliation.[1] (Plaintiff's Complaint, at ¶¶14-20). Plaintiff, however, is precluded from pursuing his claims in court because of his written agreement to submit his claims to binding arbitration. Plaintiff entered into a Mutual Agreement to Arbitrate all "past, present and future disputes" with Defendant including tort claims, contract claims and statutory claims. A true and correct copy of the Arbitration Agreement executed by Plaintiff is attached as Exhibit 1 to the Declaration of Steven A. Spratt ("Spratt Decl.").[2]

Plaintiff must arbitrate his disputes because Defendant can establish what the U.S. Supreme Court has described as the "gateway issues": the existence of a valid agreement that covers the dispute. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Moreover, Plaintiff agreed that:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement.

---

[1] Plaintiff simply states that RAC's alleged actions are "in violation of the Plaintiff's federally protected rights" without identifying the specific statute under which Plaintiff seeks relief. (See ¶15 of Plaintiff's Complaint).

[2] By letter dated February 27, 2007, Defendant's counsel asked Plaintiff's counsel to submit Plaintiff's claims to arbitration. Plaintiff's counsel has not yet responded.

(Spratt Decl., Ex. 1, p. 3). Pursuant to Plaintiff's agreement to arbitrate, the Nevada Uniform Arbitration Act ("NUAA") and the Federal Arbitration Act ("FAA"), Defendant requests that the Court compel Plaintiff to arbitrate his claims and stay this action pending arbitration. *See* NRS 38.015-38.205, inclusive; 9 U.S.C. §§ 3-4.

II. STATEMENT OF FACTS

On or about February 24, 2003, Plaintiff executed upon his initial hire and as a condition of employment with Defendant, an Arbitration Agreement. (Spratt Decl., Ex. 1). Under the Arbitration Agreement, Plaintiff agreed to arbitrate all claims or controversies as follows:

> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of my application for employment, assignment/employment, or the termination of my assignment/employment that the Company may have against me or that I may have against any of the following: (1) the Company, (2) its officers, directors, employees, or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary, and affiliated entities, (4) the benefit plans or the plans' sponsors, fiduciaries, administrators, affiliates, and agents, and/or (5) all successors and assigns of any of them.
>
> The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of

> any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers' compensation, marital status, medical condition, handicap or disability); claims for benefits (except claims under an employee benefit or pension plan that either (1) specifies that its claims procedure shall culminate in an arbitration procedure different from this one, or (2) is underwritten by a commercial insurer which decides claims); and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance, except claims excluded in the section of this Agreement entitled "Claims Not Covered by the Agreement."
>
> Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination to the Equal Employment Opportunity Commission, or a similar fair employment practices agency, or an administrative charge within the jurisdiction of the National Labor Relations Board) in any way related to any claim covered by this Agreement.

(Spratt Decl., Ex. 1, p. 1.)

In his Complaint, Plaintiff alleges race discrimination and retaliation under federal law. These claims are indisputably covered under the clear and unambiguous terms of the Arbitration Agreement signed by Plaintiff and, therefore, must be submitted to binding arbitration.

III. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

In deciding whether a dispute is subject to arbitration pursuant to the FAA, a court must determine whether a valid agreement to arbitrate exists, and, if so, whether the subject matter of the dispute is covered by the arbitration agreement. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 716 (9th Cir. 1999). Because the Arbitration Agreement is valid and enforceable and unambiguously covers the subject matter of Plaintiff's claims against Defendant, his claims are subject to arbitration under the FAA.

IV. LEGAL AUTHORITIES

A. Plaintiff Agreed to Arbitrate any Challenges to the Enforceability or Applicability of the Agreement.

As a preliminary matter, any attempts by Plaintiff to claim that the Arbitration Agreement does not apply to some or all of his claims or is otherwise unenforceable are not properly before this Court because Plaintiff expressly agreed that:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of the agreement is void or voidable.

(Spratt Decl. Ex. 1, pp. 2-3) (emphasis added). The United States Supreme Court has held that parties may agree to submit the issue of "arbitrability" to the arbitrator for decision. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *AT&T Techs., Inc. v. Comms. Workers*, 475 U.S. 643, 649 (1986)). Thus, in *First Options*, the Supreme Court held that the arbitrator, and not the court, must decide issues regarding "arbitrability" (i.e., what claims the parties have agreed to arbitrate) when there is "clear and unmistakable evidence" that this was the parties' intent. *Id.* at 944. Here, the parties have clearly and unmistakably given the Arbitrator the authority to decide whether the Arbitration Agreement is applicable to particular legal claims. (Spratt Decl., Ex. 1, pp. 2-3.).

Normally, in deciding whether to compel arbitration, the trial court is tasked with determining two "gateway" issues: (1) whether there was an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002). Additionally, the Supreme Court has stated that the "question of arbitrability is for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *First Options*, 514 U.S. at 944; *AT&T Techs*, 475 U.S. at 649. However, when, as in this case, the parties have agreed to submit the question of arbitrability to

the arbitrator, the court's inquiry is limited to the issue of whether the party seeking arbitration is making a claim which is, on its face, governed by the contract. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *Anderson v. Pitney Bowes, Inc.*, 2005 U.S. Dist. LEXIS 37662, *14-15 (N.D. Cal. 2005). By clearly and explicitly providing the arbitrator with the exclusive authority to decide the issues of interpretation, applicability, enforceability and formation of the agreement, the parties have clearly and unmistakably agreed that an arbitrator, not a court, decides these issues. *First Options*, 514 U.S. at 944. Accordingly, Plaintiff may not be heard in this case to argue that a court must decide the very issues that the parties have "clearly and unmistakably" left to the arbitrator, who has "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . .". (Spratt Decl., Ex. 1, pp. 2-3.).

Similarly, any contention by Plaintiff that the Arbitration agreement is void or voidable because of alleged formation defects or due to alleged unconscionability must also be decided by the arbitrator and not the Court. *See, e.g., Anderson*, 2005 U.S. Dist. LEXIS 37662 (under nearly identical language giving the arbitrator the authority to determine any claim that the arbitration agreement was void or voidable, the court held that the parties clearly and unmistakably conferred upon the arbitrator the power to decide unconscionability); *Stewart v. Paul, Hastings, Janofsky & Walker, LLP*, 201 F. Supp 2d 291 (S.D.N.Y 2002) (under similar language in the arbitration agreement, the court held that the arbitrator has the exclusive jurisdiction to determine unconscionability). Thus, even Plaintiff's attempt to

challenge the enforceability of the Arbitration Agreement is a matter that properly belongs before an arbitrator and not the Court.

In this case, there can be no question that Plaintiff entered into an Arbitration Agreement with Defendant, an agreement which, on its face, covers the claims that he brings in this lawsuit. This is all the Court needs to find in order to compel Plaintiff to arbitrate his claims. To the extent that Plaintiff wishes to argue that the Arbitration Agreement is void due to formation defects or because of unconscionability, or that the Arbitration Agreement does not cover all of his claims, those issues must be decided in arbitration. The Court should thus dismiss the Complaint or alternatively, stay the action pending a duly appointed arbitrator's ruling on any "dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, both not limited to any claim that all or any part of the Agreement is void or voidable." (Spratt Decl., Ex. 1, pp. 2-3.)

B. The Arbitration Agreement is Valid and Enforceable.

Should the Court somehow rule that issues relating to the applicability, validity or enforceability of the Arbitration Agreement are not properly within the exclusive jurisdiction of the arbitrator and must instead be decided by the Court, Plaintiff's claims should nonetheless be dismissed. To determine whether Plaintiff entered into a valid and enforceable agreement to arbitrate disputes with Defendant, the Arbitration Agreement must be examined under Nevada law regarding contract formation. *First Options*, 514 U.S. at 944. Whether the parties have agreed to arbitrate a dispute is governed by ordinary

contract principles, which in this case are derived from the substantive law of Nevada because the events surrounding the formation and execution of the Arbitration Agreement arose here. *Id.; see also Kindred v. Second Judicial District Court*, 116 Nev. 405, 409-11, 996 P.2d 903, 906-08 (2000) (noting that "in reviewing arbitration agreements, the issue of '[w]hether a dispute is arbitrable is essentially a question of construction of a contract'") (quoting *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)).

The instant Arbitration Agreement meets the requirements of Nevada substantive contract law and, thus, is a valid and enforceable agreement by Plaintiff to arbitrate his claims. First, the parties agreed to arbitration. Second, Plaintiff's signature evidences his clear and definite consent. Specifically, the Arbitration Agreement sets forth clear, definite terms—and the essential terms were communicated to Plaintiff in writing. Furthermore, mutual assent of Plaintiff and Defendant is clear in light of the fact that the Arbitration Agreement expressly states that assent is mutual. The Agreement provides that "[t]he Company and I mutually consent to the resolution by arbitration of all claims or controversies . . . ." (Spratt Decl., Ex. 1, p. 1). Third, the Arbitration Agreement has a lawful purpose. *Hash v. FedEx Home Delivery*, 2006 U.S. Dist. LEXIS 51110 (D. Nev. July 6, 2006) (Hicks, J.) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.") Fourth, the parties have a cause or

reason for obligating themselves. Plaintiff accepted the obligation to arbitrate as a condition of his employment. As such, Plaintiff mutually gave up the right to litigate his claims as consideration for the Arbitration Agreement, as explicitly recited therein: "The promises by the Company and by me to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other." (Spratt Decl., Ex. 1, p. 4.) The Arbitration Agreement provides that arbitration is the exclusive remedy for any claims covered thereunder, both parties are required to submit their disputes to arbitration, and arbitration is final and binding upon both parties. (Spratt Decl., Ex. 1, pp. 1, 4.) Accordingly, the existence of a valid and enforceable Arbitration Agreement is undeniable.

C. The Federal Arbitration Act Governs the Arbitration Agreements.

The FAA applies to agreements "involving commerce." 9 U.S.C. § 2. Because Defendant operates stores in most of the United States and sells goods that are purchased out of state and that are transported across state lines, its activities involve interstate commerce, and thus, arbitration agreements entered with its employees are covered by the FAA. Moreover, Plaintiff agreed in the Arbitration Agreement that "the [C]ompany is engaged in transactions involving interstate commerce and that my assignment/employment with the Company involves such commerce." (Spratt Decl., Ex. 1, p. 3.)

Because the FAA governs the Arbitration Agreement, the Supremacy Clause of the United States Constitution requires that Plaintiff's claims be arbitrated notwithstanding any contrary state law. Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the

FAA preempts all otherwise applicable or conflicting state laws. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting Section 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration."). Indeed, the FAA is a "[c]ongressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of this Section [§ 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Accordingly, any state law conflicting with the FAA violates the Supremacy Clause and is void. *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215, 219 (5th Cir. 1997). Thus, the arbitration agreement must be enforced under federal law.

Even assuming, *arguendo*, that the FAA was somehow inapplicable, Nevada law similarly requires that Plaintiff arbitrate his claims against RAC because Nevada law similarly favors the arbitrability of employment disputes. The Uniform Arbitration Act ("UAA") governs arbitration agreements in Nevada. *See* NRS 38.015 - 38.205, inclusive. Under clear principles set out in the UAA, and Nevada case law interpreting the UAA, Plaintiff's claim is subject to a binding arbitration agreement.

Section 38.035 of the UAA provides in pertinent part:

> **A written agreement to submit any existing controversy to arbitration** or a provision in a

> written contract to submit to arbitration any controversy thereafter arising between the parties **is valid, enforceable and irrevocable,** save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis added)

Notably, NRS 38.035 "appl[ies] to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement." NRS 38.035. Thus, the type of agreement that exists between RAC and Jackson in this case is clearly provided for by the UAA. Additionally, "[t]here is a strong public policy [in Nevada] favoring contractual provisions requiring arbitration as a dispute resolution mechanism. Consequently, when there is an agreement to arbitrate we have said there is a 'presumption of arbitrability.'" *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 717 (1990). Thus, arbitration agreements, with certain limited exceptions, are valid, enforceable and irrevocable. *Phillips*, 106 Nev. at 417, 794 P.2d at 717.

The Nevada Supreme Court is very strong in its support of such arbitration agreements. *See Kindred v. Second Judicial District Court*, 116 Nev. 405, 409-11, 996 P.2d 903, 906-08 (2000) (noting that the UAA "governs arbitration agreements in Nevada" and that "Nevada overwhelmingly favors arbitration"). Further, "in reviewing arbitration agreements, the issue of '[w]hether a dispute is arbitrable is essentially a question of construction of a contract.'" *Kindred*, 116 Nev. at 410, 996 P.2d at 907 (quoting *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990)). Further, arbitration clauses are to be construed liberally in favor of arbitration. *Phillips v. Parker*, 794 P.2d at 718.

The Nevada statute similarly requires that claims subject to arbitration be stayed and compelled to arbitration. N.R.S. 38.221:

> 1. On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> (a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
>
> (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.
>
> * * *
>
> 6. If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

Thus, Plaintiff's claims are arbitrable under the FAA and the Nevada Uniform Arbitration Act, assuming *arguendo* that the FAA was inapplicable.

D. Arbitration of Plaintiff's Claims is Favored by Federal Law.

The FAA was originally enacted in 1925 to reverse the "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Circuit*

City Stores v. Adams, 532 U.S. 105 (2001). In *Circuit City*, the Supreme Court noted the significant benefits of arbitrating claims in the employment context. *Id.* at 122-23.

In addition to its "enforceability of arbitration agreements" provision, the FAA also provides for a stay of proceedings in district courts when an issue in the proceedings is referable to arbitration. 9 U.S.C. § 3. Where some, but not all, of a plaintiff's claims are arbitrable, a stay of judicial proceedings pending arbitration is appropriate. However, where, as here, all of Plaintiff's claims are arbitrable, a stay is not necessary, and the legal action should be dismissed. *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.*, 586 F.2d 143, 145-148 (9th Cir. 1978). Additionally, the FAA provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C. § 4. "These provisions manifest a 'liberal federal policy favoring arbitration agreements.'" *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). Accordingly, the Court should dismiss plaintiff's case and compel him to arbitration. Alternatively, the Court should stay the proceedings pending arbitration.

E. Doubts Are Resolved in Favor of Arbitration.

Under the FAA, an arbitration agreement must be enforced where a valid, written agreement exists and the claims made are within the scope of the agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula*, 175 F.3d at 719.

As this Court has recognized, the United States Supreme Court and the United States Court of

Appeals for the Ninth Circuit have applied a liberal presumption in favor of arbitrability. *Hash v. FedEx Home Delivery*, 2006 U.S. Dist. LEXIS 51110 (D. Nev. July 6, 2006)(Hicks, J.) ("Federal standards on arbitrability require that courts address such agreements with a "healthy regard" for the policy favoring arbitration."); *see also Gilmer*, 500 U.S. at 26; *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Assoc.*, 218 F.3d 1085, 1091 (9th Cir. 2000) (quoting *Southland Corp.*, 465 U.S. at 10.) The United States Supreme Court reaffirmed its commitment to the arbitration process in *Circuit City*, where the Court held that the FAA applies to employment agreements. *Circuit City*, 532 U.S. at 119. The *Circuit City* decision constitutes a ringing endorsement of the arbitration process by our Nation's highest court and reaffirms that the FAA compels judicial enforcement of otherwise valid arbitration agreements. *Id.* at 122-23 (noting that "there are real benefits to the enforcement of arbitration provisions" and that the Court has "been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context"). Indeed, district courts must defer to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute . . . doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960). This Court should therefore resolve any doubts regarding the scope and enforceability of the Arbitration Agreement in favor of arbitration. *Simula*, 175 F.3d at 719.

F. The Arbitration Agreement Expressly Cover Plaintiff's Claims.

The Arbitration Agreement is unambiguous and is sufficiently broad to cover Plaintiff's claims. The Arbitration Agreement applies to "all claims or controversies ('claims'), past, present or future, whether or not arising out of [Plaintiff's] application for employment, assignment/employment, or the termination of [Plaintiff's] assignment/employment that the Company may have against [Plaintiff] or that [Plaintiff] may have against . . . the Company . . . ." (Spratt Decl., Ex. 1, p. 1.) Moreover, the Agreement states that "[t]he only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law." *Id.* These claims include but are not limited to discrimination and tort claims and "claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance . . ." *Id.* Therefore, the Agreement is sufficiently broad to cover all of Plaintiff's claims against Defendant.[3]

Furthermore, the broad scope of the Arbitration Agreement is demonstrated in the explicit acknowledgment that by entering into the Agreement, Plaintiff waived his right to a judicial forum for all claims covered by the Arbitration Agreement: "I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO A JURY TRIAL." (Spratt Decl., Ex. 1, p. 4.) (emphasis in original). The parties to the Arbitration Agreement intended that arbitration be the exclusive remedy for all claims

[3] As stated in Section IV.A. above, any challenges to the "interpretation" or "applicability" of the Agreement must be resolved by the arbitrator and not a court.

relating to Plaintiff, and all of Plaintiff's claims must therefore be submitted to binding arbitration pursuant to the FAA. This Court should resolve any doubts regarding the *scope* and enforceability of the Arbitration Agreement in favor of arbitration.

V. CONCLUSION

Plaintiff agreed to arbitrate disputes with Defendant. Because Plaintiff's claims fall within the scope of the Arbitration Agreement, the Court lacks subject matter jurisdiction over his claims, and, as a result, should dismiss the lawsuit, or, alternatively, stay the proceedings pending arbitration.

Defendant respectfully requests an order dismissing the lawsuit by Plaintiffs in its entirety or, in the alternative, staying these proceedings and compelling the arbitration of Plaintiff's claims in accordance with the Arbitration Agreement.

Defendant also respectfully requests that the Court award Defendant its attorneys' fees and costs for Plaintiff's unreasonable failure to dismiss this suit, despite the existence of the Arbitration Agreement.

Dated: March 13, 2007 LITTLER MENDELSON

By: /s/
SUELLEN FULSTONE, ESQ.
Attorneys for Defendant
RENT-A-CENTER WEST, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

[Filed 03/14/07]

Case No. 3:07-CV-00050-LRH-RAM

ANTONIO JACKSON,
Plaintiff,

vs.

RENT-A-CENTER WEST, INC.,
Defendant.

DECLARATION OF STEVEN A. SPRATT

I, STEVEN A. SPRATT, hereby declare as follows:

1. My name is STEVEN A. SPRATT. I am over the age of twenty-one (21) years, of sound mind, have never been convicted of a felony, am capable of making this Affidavit, and have personal knowledge of the facts stated below, and they are true and correct.

2. I am employed by Rent-A-Center as Director of Compensation and Benefits and am the Custodian of Records for Rent-A-Center. As result of my job duties, I am personally familiar with Rent-a-Center's policy regarding arbitration.

3. Since on or about July 2000, Rent-A-Center has required all new employees to agree to arbitrate all past, present, and future disputes. The agreement explicitly covers discrimination and tort claims, among other potential claims. Since on or about September, 2001, RAC has also required all employees who receive promotions to agree to arbitrate all past, present and future disputes.

4. A true and correct copy of Rent-A-Center's Mutual Agreement to Arbitrate Claims ("Agreement"), signed by Antonio Jackson, is attached hereto as Exhibit "1". The attached document is kept by Rent-A-Center in the regular course of business, and it was the regular course of business of Rent-A-Center for an employee or representative of Rent-A-Center, with knowledge of the event, act, condition, or opinion recorded, to make the report or to transmit information thereof to be included in such report.

5. I declare under penalty of perjury, under the laws of the State of Nevada, that the foregoing two page declaration is true and correct to the best of my knowledge. Executed this the 13th day of March, 2007.

/s/ STEVEN A. SPRATT
STEVEN A. SPRATT

EXHIBIT 1

RENT-A-CENTER, INC.

MUTUAL AGREEMENT TO ARBITRATE CLAIMS

I recognize that differences may arise between Rent-A-Center, Inc. (the "Company") and me during or following my application/assignment/employment, including any/or all periods of employment with the Company and/or separation therefrom, and that those differences may or may not be related to my application/assignment/employment. I understand and agree that by entering into this Agreement to Arbitrate Claims ("Agreement"), I anticipate gaining benefits of a speedy, impartial, final, and binding dispute-resolution procedure.

Except as provided in this Agreement, the Federal Arbitration Act shall govern interpretation, enforcement, and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, state law pertaining to agreements to arbitrate shall apply.

I understand that any reference in this Agreement to the Company will be a reference also to all parent, subsidiary, and affiliated entities, all benefit plans, the benefit plans' sponsors, fiduciaries, administrators, affiliates, and all successors and assigns of any of them.

CLAIMS COVERED BY THE AGREEMENT

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of my application for employment, assignment/employment, or the termination of my assignment/employment that the Company may have

against me or that I may have against any of the following: (1) the Company, (2) its officers, directors, employees, or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary, and affiliated entities, (4) the benefit plans or the plans' sponsors, fiduciaries, administrators, affiliates, and agents, and/or (5) all successors and assigns of any of them.

The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers' compensation, marital status, medical condition, handicap or disability); claims for benefits (except claims under an employee benefit or pension plan that either (1) specifies that its claims procedure shall culminate in an arbitration procedure different from this one, or (2) is underwritten by a commercial insurer which decides claims); and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance, except claims excluded in the section of this Agreement entitled "Claims Not Covered by the Agreement."

Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination to the Equal Employment Opportunity Commission, or a similar fair employment practices

agency, or an administrative charge within the jurisdiction of the National Labor Relations Board) in any way related to any claim covered by this Agreement.

CLAIMS NOT COVERED BY THE AGREEMENT

Claims I may have for workers' compensation benefits and unemployment compensation benefits are not covered by this Agreement. Also not covered are claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which either party may seek and obtain relief from a court of competent jurisdiction.

TIME UNITS FOR COMMENCING ARBITRATION AND REQUIRED NOTICE OF ALL CLAIMS

The Company and I agree that the aggrieved party must give written notice of any claim to the other party no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim. Otherwise, the claim shall be void and deemed waived. The legal doctrine of tolling, equitable or otherwise, shall not apply to extend the statute of limitations for bringing a claim covered by this Agreement. I understand that I am encouraged to give written notice of any claim as soon as possible after the event or events in dispute so that arbitration of any differences may take place promptly.

Written notice to the Company, or its officers, directors, employees or agents shall be sent to its home office to the attention of Coworker Relations. I will be given written notice at the last address provided in writing to the Company. The written notice

shall identify and describe the nature of claims asserted and the facts upon which such claims are based and the relief or remedy sought. The notice shall be sent to the other party by certified or registered mail, return receipt requested.

REPRESENTION

Any party may be represented by an attorney or other representative selected by the party.

DISCOVERY

Each party shall have the right to take the deposition of one individual and any expert witness designated by another party. Each party also shall have the right to propound requests for production of documents to any party. The subpoena right specified below shall be applicable to discovery pursuant to this paragraph. Additional discovery may be had only where the arbitrator selected so orders.

DESIGNATION OF WITNESSES

At least thirty (30) days before the arbitration, the parties must exchange lists of witnesses, including any experts, and copies of all exhibits intended to be used at the arbitration

SUBPOENAS

Each party shall have the right to subpoena witnesses and documents for the arbitration, as well as documents relevant to the case from third parties.

ARBITRATION PROCEDURES

The arbitration will be held under the auspices of either the American Arbitration Association ("AAA"), Judicial Arbitration & Mediation Services/Endispute ("J-A-M-S"), or any other service to which the parties

agree, with the designation of the sponsoring organization to be made by the party who did not initiate the claim.

The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance with the then-current Model Employment Arbitration Procedures of the AAA or equivalent (if AAA is designated), the then-current J-A-M-S Employment Arbitration Rules or equivalent (if J-A-M-S is designated), or the applicable rules of any other service to which the parties mutually agree. The arbitrator shall be either a retired judge, or an attorney who is experienced in employment law and licensed to practice law in the state in which the arbitration is convened (the "Arbitrator"). The arbitration shall take place in or near the city in which I am or was last employed by the Company. The Arbitrator shall be selected as follows: The service selected shall give each party a list of eleven (11) arbitrators drawn from its panel of employment dispute arbitrators. Each party shall have ten (10) calendar days from the postmark date on the list to strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate the claim shall strike first. If no common name remains on the lists of all parties, the selected service shall furnish an additional list of eleven (11) arbitrators from which the parties shall strike alternately, with the party initialing the claim striking first, until only one name remains. That person shall be designated as the Arbitrator.

The Arbitrator shall apply the substantive law including, but not limited to applicable statutes of limitations (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law or law of remedies. The Federal Rules of Evidence shall apply. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

The Arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold pre-hearing conferences by telephone or in person as the Arbitrator deems necessary. The Arbitrator shall have the authority to entertain a motion to dismiss and/or a motion for summary judgment by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedure and applicable federal common law. The arbitrator shall be paid an agreed upon hourly rate for the time spent reviewing and ruling on such motions, and such fee shall be paid by the moving party unless otherwise ordered by the Arbitrator or otherwise required by law.

Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings. Should any party refuse or neglect to appear for or participate in, the arbitration hearing, the Arbitrator shall have the

authority to decide the dispute based upon whatever evidence is presented. Either party, upon request at the close of hearing, shall be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the Arbitrator.

The Arbitrator shall render an award by written opinion in the form typically rendered in labor arbitrations no later than thirty (30) days from the date the arbitration hearing concludes or the post-hearing briefs (if requested) are received, whichever is later. The opinion shall be in writing and include the factual and legal basis for the award.

Either party shall have the right, within twenty (20) days of issuance of the Arbitrator's opinion, to file with the Arbitrator a motion to reconsider (accompanied by a supporting brief), and the other party shall have twenty (20) days from the date of the motion to respond. The Arbitrator thereupon shall reconsider the issues by the Motion and promptly either confirm or change the decision, which (except as provided by this Agreement) shall then be final and conclusive upon the parties. The costs of such a motion for reconsideration and written opinion of the Arbitrator shall be borne by the party prevailing on the motion, unless the Arbitrator orders otherwise.

ARBITRATION FEES AND COSTS

The Company and I shall equally share any filing fees and the cost of the Arbitrator's fee, in the amount and manner determined by the Arbitrator, ten (10) days before the first day of hearing. Each party shall pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim which affords the prevailing party attorneys' fees, or if there is a written agreement providing for

fees, the Arbitrator may award reasonable fees to the prevailing party. In the event the law of the jurisdiction in which the arbitration is held requires a different allocation of fees and costs in order for this Agreement to be enforceable, then such law shall be followed.

JUDICIAL REVIEW

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award. A party opposing enforcement of an award may bring a separate action in any court of competent jurisdiction to set aside the award, where the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.

INTERSTATE COMMERCE

I understand and agree that the company is engaged in transactions involving interstate commerce and that my assignment/employment with the Company involves such commerce.

REQUIREMENTS FOR MODIFICATION OR REVOCATION

This Agreement to arbitrate shall survive the termination of my assignment/employment and the expiration of any benefit. It can only be revoked or modified by a writing signed by the parties which specifically states an intent to revoke or modify this Agreement.

SOLE AND ENTIRE AGREEMENT

This is the complete agreement of the parties on the subject of arbitration of disputes. This Agreement

supersedes any prior or contemporaneous oral or written understandings on the subject. No party is relying on any representations, oral or written, on the subject of the effect, enforceability, or meaning of this Agreement, except as specifically set forth in this Agreement. All remaining provisions shall remain in full force and effect.

CONSTRUCTION

If any provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement. All remaining provisions shall remain in full force and effect.

CONSIDERATION

The promises by the Company and by me to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other.

NOT AN EMPLOYMENT AGREEMENT

This Agreement is not, and shall not be construed to create, any contract of employment, express or implied. Nor does this agreement in any way alter the "at-will" status of my assignment/employment.

AGREEMENT

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT; THAT I UNDERSTAND ITS TERMS; THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT; AND THAT I HAVE ENTERED INTO THE AGREEMENT AND NOT IN RELIANCE ON ANY PROMISES OR

REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO A JURY TRIAL.

I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO.

/s/ ANTONIO JACKSON
ANTONIO JACKSON
APPLICANT/EMPLOYEE SIGNATURE

267-55-7366
SOCIAL SECURITY NUMBER

ANTONIO JACKSON
PRINT NAME

02-24-03
DATE

[Illegible]
STORE MANAGER OR OTHER AUTHORIZED COMPANY REPRESENTATIVE

Store Manager
TITLE OF REPRSENTATIVE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 03/20/07]

Case No. CV07-00050-LRH (RAM)

ANTONIO JACKSON,
Plaintiff,

vs.

RENT-A-CENTER WEST, INC.,
Defendant.

OPPOSITION TO MOTION TO COMPEL ARBITRATION AND FOR ATTORNEY FEES

Plaintiff, ANTONIO JACKSON, by and through Counsel, Ian E. Silverberg, Esq., and Hardy Law Group, hereby submits the following Opposition to Motion to Compel Arbitration. This Opposition is made and based upon the following Points and Authorities.

DATED this 20th day of March, 2007.

/s/

Ian E. Silverberg, Esq. (#5501)
Hardy Law Group
96 Winter Street
Reno, NV 89503
(775) 322-7422

Attorney for Plaintiff
ANTONIO JACKSON

POINTS AND AUTHORITIES

Contrary to the assertion of the defendant in this matter, the arbitration agreement in question is clearly unenforceable in that it is unconscionable. In arriving at this conclusion, Plaintiff relies upon the Ninth Circuit opinion of *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 CA.9 (Cal.), 2002. The *Ferguson* opinion sets forth very clearly the guidelines of when an arbitration agreement in the context of a Title VII claim will be upheld, and based upon this opinion, and relevant Nevada case law, there is simply no question that the Defendant's arbitration agreement is unenforceable.

Ferguson stands for the proposition that in order for an arbitration agreement to be invalid, it must be both procedurally and substantively unconscionable.

The procedural unconscionability "concerns the manner in which the contract was negotiated and the circumstances of the parties at that time." *Kinney v. United Healthcare Servs., Inc.*, 70 Cal.App.4th 1322, 83 Cal.Rptr.2d 348, 352-53 (Ct.App.1999). A determination of whether a contract is procedurally unconscionable focuses on two factors: oppression and surprise. "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. 'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." (See *Stirlen v. Supercuts, Inc.*, 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138, 145 (Ct. App.1997).

The U.S. Supreme Court addressed this issue in *Circuit City v. Adams*, 532 U.S. 105, 121 S.Ct. 1302,

149 L.Ed.2d 234 (2001). In this opinion, the court found that Circuit City possesses considerably more bargaining power than nearly all of its employees or applicants, drafted the contract and uses it as its standard arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms—they must take the contract or leave it. (See also, Stirlen, 60 Cal.Rptr.2d at 146 (finding procedural unconscionability where an arbitration clause is part of a contract of adhesion in which the employee is presented with an employment contract on a "take it or leave it" basis).

In the present case, as in *Circuit City*, the arbitration agreement was imposed as a condition of employment and was non-negotiable. The Defendant will likely argue that there was no element of "surprise" or "oppression" in its arbitration agreement because Jacksoon had ample time to consider alternatives to Rent-A-Center's terms of employment, and the contract was written in plain language. A California appellate court recently rejected these arguments, holding that whether the plaintiff had an opportunity to decline the defendant's contract and instead to enter into a contract with another party that does not include the offending terms is not the relevant test for procedural unconscionability. *See Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, 867 (Ct.App.2002). Instead, California courts have consistently held that where a party in a position of unequal bargaining power is presented with an offending clause without the opportunity for meaningful negotiation, oppression and, therefore, procedural unconscionability, are present.

Because the Plaintiff was in a position of unequal bargaining power and was presented with offending contract terms without an opportunity to negotiate, the arbitration agreement is clearly procedurally unconscionable.

As to the issue of substantive unconscionability, this focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience. (See *Kinney*, 83 Cal.Rptr.2d at 353)

Based upon existing precedent, the arbitration agreement in question contains terms that are one sided and shock the conscience.

a. One-sided coverage of arbitration agreement

The Defendant's arbitration agreement specifically covers claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination or harassment based on race, sex, age, or disability, and claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy.

On the other hand, the arbitration agreement specifically excludes claims for workers' compensation or unemployment compensation benefits, injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information. In *Mercuro*, 116 Cal.Rptr.2d at 681, the Court held that the arbitration agreement was unfairly one-sided and, therefore, substantively unconscionable because the agreement compels arbitration of the claims employees are most likely to bring but exempts from arbitration the claims an employer is most likely to bring against its employees.

Further, in *Mercuro*, the court concluded that the inclusion of workers' compensation or unemployment compensation benefits among those claims that are exempt from the arbitration agreement did not turn what is essentially a unilateral arbitration agreement into a bilateral one. Mercuro, 116 Cal. Rptr.2d at 677.

b. Arbitration Fees

In *Armendariz*, the California Supreme Court held that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any expense that the employee would not be required to bear if he or she were free to bring the action in court. This rule will ensure that employees bringing discrimination claims will not be deterred by costs greater than the usual costs incurred during litigation, cost that are essentially imposed on an employee by the employer. (See Armendariz, 99 Cal.Rptr.2d 745, 6 P.3d at 687).

The Defendant's arbitration agreement has a provision that requires the employee to pay for half the arbitration fees with no cap. However, *Armendariz* holds that a fee provision is unenforceable when the employee bears *any* expense beyond the usual costs associated with bringing an action in court. Further, in *Circuit City*, the court held that a fee allocation scheme which requires the employee to split the arbitrator's fees with the employer would alone render an arbitration agreement substantively unconscionable. *Circuit City*, 279 F.3d at 894.

c. One-sided discovery provision

Plaintiff further maintains that the discovery provision in the arbitration agreement is one-sided

and, therefore, unconscionable. The discovery provision states that each party can take the deposition of one individual and one corporate representative. Further, the agreement limits written discovery to requests for production.

While some limits n discovery do not necessarily invalidate an arbitration agreement, there is a pattern in the Defendant's arbitration agreement. Not only do these discovery provisions appear to favor Countrywide at the expense of its employees, but the entire agreement seems drawn to provide the Defendant with undue advantages should an employment-related dispute arise. Aside from merely availing itself of the cost-saving benefits of arbitration, the Defendant has sought an advantage by substantively tilting the playing field.

While the discovery provisions alone are not unconscionable, in the context of an arbitration agreement which unduly favors the Defendant at every turn, the limits on discovery further supports the Plaintiff's contention that the arbitration agreement as a whole is substantively unconscionable.

The Defendant will likely argue that the offending provisions can be severed or limited. Plaintiff disagrees. In *Armendariz*, the California Supreme Court declined to sever the unconscionable provisions of an arbitration agreement for two reasons, both of which are applicable to the Defendant's arbitration agreement. First, the court found that there was more than one unlawful provision and that such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. (See Armendariz, 99 Cal. Rptr.2d 745, 6 P.3d at 696-97). Second, the agreement's

lack of mutuality so permeated the contract that the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. *Id.* at 697.

In the instant case, the lack of mutuality regarding the type of claims that must be arbitrated, the fee provision, and the discovery provision, so permeate the Defendant's arbitration agreement that it would be impossible to sever the offending provisions. In Mercuro, the California Court of Appeal reached the same conclusion and declined to sever the objectionable provisions of a similar arbitration agreement, noting "[i]f we did so there would be virtually nothing of substance left to the contract. Instead, we would need to rewrite those provisions according to what we believed was fair and equitable. This, of course, we cannot do." *Mercuro*, 116 Cal.Rptr.2d at 684. For these same reasons, the court should find that the Defendant's arbitration agreement is so permeated with unconscionable clauses that it cannot remove the unconscionable taint from the agreement.

Nevada case law also supports the Plaintiff's argument that the arbitration agreement is unconscionalbe and thus unenforceable.

In *Burch v. Second Judicial Dist. Court of State ex rel. County of Washoe*, 118 Nev. 438, 49 P.3d 647 Nev., 2002, the Court stated the following:

> "Under the circumstances of this case, the HBW is an unconscionable adhesion contract and, therefore, unenforceable. . . This court has defined an adhesion contract as a standardized contract form offered to consumers . . . on a take it or leave it basis, without affording the consumer a realistic opportunity to bargain. The distinctive

feature of an adhesion contract is that the weaker party has no choice as to its terms. Here, the one-page application and the HBW were pre-printed, standardized contract forms. The Burches, the weaker party, were not given an opportunity to negotiate the HBW's terms with Double Diamond or its insurer, National Home Insurance Company (NHIC); they were required to take it or leave it. Therefore, the HBW agreement between the Burches and Double Diamond is an adhesion contract. This court permits the enforcement of adhesion contracts where there is plain and clear notification of the terms and an understanding consent, and if it falls within the reasonable expectations of the weaker . . . party. This court need not, however, enforce a contract, or any clause of a contract, including an arbitration clause, that is unconscionable. . . . *See* NRS 104.2302(1) (court may refuse to enforce an unconscionable contract). Although the FAA establishes a strong public policy favoring arbitration for the purpose of avoiding the unnecessary expense and delay of litigation where parties have agreed to arbitrate, it does not mandate the enforcement of an unconscionable contract or arbitration clause. The United States Supreme Court has interpreted § 2 of the FAA and held that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract. Unconscionability, therefore, is a legitimate ground upon which to refuse to enforce the HBW and its arbitration. Generally, both procedural and substantive unconscionability must be

present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable."

Based upon the foregoing, the arbitration clause would also be invalid under applicable Nevada law. As such, it is respectfully requested that the Court deny the Defendant's motion to compel arbitration and for attorney's fees.

DATED this 20th day of March, 2007.

/s/

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 04/03/07]

Case No. 3:07-CV-00050-LRH-RAM

ANTONIO JACKSON,

Plaintiff,

vs.

RENT-A-CENTER WEST, INC.,

Defendant.

REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PROCEEDINGS AND COMPEL ARBITRATION

Defendant Rent-A-Center West, Inc. ("Defendant" or "RAC"), by and through its counsel, files its Reply Points and Authorities in Support of Motion to Dismiss Proceedings and Compel Arbitration. This Motion is made and based upon the accompanying Memorandum of Points and Authorities, all pleadings and papers on file herein and any argument this Court may entertain.

Dated: April 3, 2007 LITTLER MENDELSON

By: /s/
SUELLEN FULSTONE, ESQ.
Attorneys for Defendant
RENT-A-CENTER WEST, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff has failed to meet his burden to show that the *Mutual Agreement to Arbitrate Claims* between Plaintiff and Defendant ("Arbitration Agreement" or "Agreement") is invalid. With the exception of one Nevada case, Plaintiff relies exclusively on California case law to argue that the Arbitration Agreement is unenforceable based on state contract law defenses. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995) (holding that in order to determine whether a party entered into a valid and enforceable agreement to arbitrate disputes, the arbitration agreement must be examined under state law regarding contract formation). However, Plaintiff's heavy reliance on irrelevant California case law to argue Nevada contract law defenses is misplaced.

Ignoring well settled and binding legal precedent, as well as the express language of the Agreement, Plaintiff seeks to avoid his obligations by asserting that he is not bound by the Agreement he knowingly executed. The facts and binding legal authority make clear, however, that this Court should not even reach those issues because the parties have unmistakably given the Arbitrator exclusive authority to decide issues related to the formation and enforceability of the Arbitration Agreement. Thus, the underlying dispute and Plaintiff's challenges to the enforceability of the Arbitration Agreement are to be decided by the Arbitrator. Consequently, this Court should dismiss Plaintiff's claims and compel him to fulfill his contractual obligation to arbitrate his disputes with Defendant.

II. ARGUMENT

A. The Parties Clearly and Unmistakably Provided the Arbitrator with Exclusive Authority to Determine Arbitrability.

Plaintiff's Opposition to Defendant's Motion to Dismiss fails to rebut or otherwise address in any way Defendant's argument that the Arbitrator must decide Plaintiff's challenge to the enforceability of the Agreement. Thus, Defendant's argument is uncontested.

Moreover, Plaintiff's resistance to the enforceability of the Arbitration Agreement is not properly before the Court because he expressly agreed that:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement.

("Aff, Ex. 1, p. 3"). Plaintiff conspicuously ignores the United States Supreme Court precedent cited by Defendant holding that parties may agree to arbitrate arbitrability. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995) (citing *AT&T Techs., Inc. v. Comms. Workers*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)). By clearly and explicitly providing the arbitrator with the exclusive authority to decide the issues of interpretation, applicability, enforceability and formation of the agreement, the parties in this case have clearly and unmistakably agreed that an arbitrator, not a court, decides these issues. *First Options*, 514 U.S. at 944. Thus, Plaintiff's allegations that the Arbitration Agreement is unenforceable must also be decided by the arbitrator

and not the Court. On this basis alone, this Court should dismiss Plaintiff's claims and compel arbitration.

B. Plaintiff Cannot Meet His Burden to Establish that the Agreement is Procedurally Unconscionable.

Plaintiff briefly argues that the Agreement is procedurally unconscionable because the Agreement was imposed as a condition of employment and was a non-negotiable contract of adhesion. Plaintiff's disingenuous citation to California cases that have no precedential, or even persuasive, authority is a mere distraction. The sole Nevada case cited by Plaintiff addresses a contract of adhesion included in a home warranty application where the defendant misrepresented the terms of the warranty, the plaintiffs were not given an opportunity to review the arbitration clause, the clause was buried in a thirty-one page booklet and disclaimers were inconspicuous. *See Burch v. Second Judicial Dist. Court of State ex re. County of Washoe*, 118 Nev. 438, 49 P.3d 647 (Nev. 2002). Plaintiff does not, and cannot, allege similar facts here. Moreover, under Nevada law, an employer may require an arbitration agreement as a condition of employment. *See e.g., Kindred v. Second Judicial Dist. Court*, 116 Nev. 405, 411, 996 P.2d 903 (Nev. 2000). The Nevada Supreme Court has held, "We have never applied the adhesion contract doctrine to employment cases." *Id.* And Plaintiff offers no explanation why that rule does not apply here.

The Court's analysis should end here, because Plaintiff is unable to establish procedural unconscionability and therefore fails to meet his burden to show both procedural and substantive unconscionability. *D.R. Horton, Inc. v. Green*, 120 Nev. 549,

553-554, 96 P.3d 1159 (Nev. 2004) ("Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a . . . clause as unconscionable.") (quoting *Burch v. Second Judicial Dist. Ct.*, 118 Nev. 438, 442, 49 P.3d 647, 650 (2002)). However, even if this Court proceeds with its analysis, the Arbitration Agreement is also substantively conscionable.

C. Plaintiff Cannot Establish Substantive Unconscionability.

1. The Arbitration Agreement is a Bilateral, Substantively Conscionable Agreement, and Plaintiff has not Met his Burden to Prove Otherwise.

Despite Plaintiff's assertion that the Arbitration Agreement is not bilateral, the Agreement makes clear that both Defendant and Plaintiff are required to arbitrate their respective claims against each other. The only claims expressly excluded from the Agreement are either claims that only Plaintiff can bring, such as a workers' compensation claims, or claims expressly reserved for *both* parties:

> Also not covered are claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which either party may seek and obtain relief from a court of competent jurisdiction.

("Aff, Ex. 1, p. 1") (emphasis added).

Plaintiff cites two decisions applying the law of a different jurisdiction (California) in support of his

contention that the Agreement is substantively unconscionable. However, these cases do not address Nevada law and are inapplicable here. Moreover, even if California law applied, which it does not, California courts have enforced the very same arbitration agreement, attacked on the very same grounds. (Order in *Metcalf v. Rent-A-Center*, Ex. 2; Order in *Kampff v. Rent-A-Center*, Ex. 3).

2. The Fee Provision of the Agreement Expressly Adopts the Law of this Jurisdiction and is not Unenforceable.

Defendant agreed up-front to pay the arbitrator's fees and costs according to the law of the applicable jurisdiction. ("Aff., Ex. 1, p. 3"). Plaintiff disingenuously claims he is required to pay arbitration fees despite the fact that the Arbitration Agreement expressly states that "[i]n the event the law of the jurisdiction in which the arbitration is held requires a different allocation of fees and costs in order for this Agreement to be enforceable, then such law shall be followed so as to preclude a finding that the allocation of fees and costs is unconscionable under presiding law." ("Aff., Ex. 1, p. 3"). Thus, pursuant to the express terms of the Agreement, Defendant will pay only the fees required by law. Plaintiff cannot credibly claim that a provision requiring adherence to the law is unconscionable. At any rate, Defendant agrees to pay the Arbitrator's fees and costs.

Moreover, the party seeking to invalidate an arbitration agreement on the basis of prohibitive expenses, bears the "burden of showing a likelihood of incurring such costs." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000). Mere speculation about prohibitive costs is not adequate to invalidate an arbitration

agreement. *Green Tree Fin. Corp.-Alabama*, 531 U.S. at 92; *see also*, *Hash v. FedEx Home Delivery*, 2006 U.S. Dist. LEXIS 51110 (D. Nev. July 6, 2006)(Hicks, J.). In the instant case, Plaintiff merely speculates about costs without presenting admissible or credible evidence regarding the costs associated with the arbitration.

Here, the Agreement is part of an employer promulgated plan, as contemplated by the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association (the AAA Rules). Because the Agreement arises out of an employer promulgated plan, the AAA Rules significantly cap Plaintiff's arbitration costs. Under the AAA Rules for employer promulgated plans, "[T]he employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." The filing fee for employees is capped at $150.00 and all hearing fees, hearing room rentals and expenses of the arbitrator (including required travel and other expenses) are paid by the employer (Ex. 1, para. 48). In *O'Kelly v. Vanguard Integrity Professionals, Inc.*, 2006 U.S. Dist. LEXIS 50403 (D. Nev. July 21, 2006) (Jones, J.), this Nevada District Court held that the administrative fee schedules for disputes arising out of employer-promulgated plans are not prohibitively expensive "given that given that the cost to file a complaint in Nevada State Court is $ 148, and the cost to file a complaint in federal court is $ 350."

However, even if this Court deems the fee-splitting provisions of the Agreement unenforceable, this Court need only sever the provision from the Agreement. Plaintiff agreed that

> If any provision of this Agreement is adjudged to be void or otherwise enforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement. All remaining provisions shall remain in full force and effect. The Company and I further acknowledge and agree that if any provision or clause of this Agreement is determined to be unconscionable, invalid or unenforceable, it is our desire and intention that such provision(s) be reformed and construed in such a manner that it will, to the maximum extent practicable, be deemed reasonable, valid and enforceable under the law governing the Agreement and the arbitration.

(Aff., Ex. 1, p. 4").

Plaintiff simply failed to meet his burden to show that the arbitration costs would be prohibitively expensive:

> [W]here a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs . . . . The "risk" that [Plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. . . . To invalidate the agreement on that basis would undermine the liberal federal policy favoring arbitration agreements. It would also conflict with our prior holdings that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.

Id. at 510 (quoting *Green Tree Fin. Corp.-Alabama, supra*, 531 U.S. at 91-92) (citations omitted). Moreover, Plaintiff cannot meet his burden under any circums-

tances because Defendant agreed up-front to follow the "the law of the jurisdiction" with respect to payment of arbitration fees and costs and because even if the fee-splitting provision is severed, the AAA rules cap Plaintiff's costs at $150.00.

3. Discovery Allowed under the Arbitration Agreements is Sufficient to Adequately Arbitrate Plaintiff's Claims.

Plaintiff's conclusory and wholly unsupported attack on the purported discovery limitations in the Arbitration Agreement is also without merit. Plaintiff provides no legal support for his assertion that limiting discovery is unreasonable. Indeed, the United States Supreme Court has expressly recognized that although arbitration procedures "might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (internal citations omitted). Thus, the United States Supreme Court has expressly endorsed discovery limitations in arbitration. In the instant case, this Court must reject Plaintiff's unsupported attacks on the limits placed on discovery because he has failed to present any evidence that the limitations justify the invalidation of the Agreement.

The Court should also reject Plaintiff's attack on the purported discovery limitations because the factual bases for the attacks are inaccurate. The Arbitration Agreement allows each party to take one deposition and, in addition, the deposition of the other parties' expert witnesses. The Arbitration Agreement also allows for written discovery. Significantly, the Arbi-

tration Agreement permits the arbitrator chosen by the parties to order additional discovery, if requested by either party. (Aff., Ex. 1, p. 2"). Accordingly, Plaintiff's attack on purported discovery limitations is speculative and without factual or legal support.

III. CONCLUSION

The parties have unmistakably given the Arbitrator exclusive authority to decide issues related to the formation and enforceability of the Arbitration Agreement. Thus, the underlying dispute and Plaintiff's challenges to the enforceability of the Arbitration Agreement are to be decided by the Arbitrator. However, even if this Court analyzes the validity of the Agreement, Plaintiff agreed to arbitrate disputes with Defendant arising out of his respective employment with Defendant. Plaintiff's attempts to avoid his contractual obligation to arbitrate must be disregarded because he failed to meet his burden to establish unenforceability.

WHEREFORE, Defendant respectfully requests an order dismissing the lawsuit by Plaintiff in its entirety or, in the alternative, staying these proceedings and compelling the arbitration of Plaintiff's claims in accordance with the Arbitration Agreement.

Defendant also respectfully requests that the Court award Defendant its attorneys' fees and costs for Plaintiff's unreasonable failure to dismiss this suit, despite the existence of the Arbitration Agreement.

Dated: April 3, 2007 LITTLER MENDELSON

By: /s/
SUELLEN FULSTONE, ESQ.
Attorneys for Defendant
RENT-A-CENTER WEST, INC.

EXHIBIT 2

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN JOAQUIN STOCKTON BRANCH

[Filed 04/03/07]

Case No.: CV030124

TANYA METCALF,

Plaintiff,

v.

RENT-A-CENTER, INC. SPENCER GREEN, individually and DOES 1 to 20, inclusive

Defendants.

Date: October 25, 2006
Time: 9:00 a.m.
Dept: 13

~~(Proposed)~~ Order regarding Defendant's Motion to Compel Arbitration and Stay This Action

---

On October 25, 2006, in Department 13 of the above-entitled Court, the Motion of Defendants Rent-A-Center, Inc. and Spencer Green ("Defendants") to Compel Arbitration and Stay Proceedings, came on regularly for hearing in this matter, the Honorable Bob W. McNatt, presiding. Defendants were represented by Henry D. Lederman, in person, and Plaintiff was represented by Michael J. Dyer, via court call.

After considering all of the papers submitted and oral argument, and for good cause appearing, the Court finds as follows:

IT IS HEREBY ORDERED, that Defendants Motion to Compel Arbitration and Stay Proceedings is GRANTED. Defendants are required to pay all of the arbitrator's costs.

Dated: 11/3/06

/s/ B.W. McNatt
B.W. McNatt
Judge of the Superior Court

EXHIBIT 3

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12 /19/ 06 DEPT. 48
HONORABLE ELIZABETH ALLEN WHITE JUDGE
HONORABLE JUDGE PRO TEM
NONE Deputy Sheriff
A. BARTON DEPUTY CLERK
E. LASKEY COURTROOM ASSISTANT
ELECTRONIC RECORDING MONITOR
A. F. VAUGHN, CSR #3369 Reporter

HARVEY KAMPF

VS

RENT-A-CENTER, INC., ET AL.

BC359004
8:30 am

Plaintiff Counsel DOUGLAS B. HAYES (X)
Defendant Counsel HENRY D. LEDERMAN (X)

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS, RENT-A-CENTER, INC. AND DAVE MULLANEY, TO COMPEL ARBITRATION AND STAY PROCEEDINGS AO

Matter is called for hearing and argued.

Defendant's motion to compel arbitration and stay proceedings is granted.

Moving party is ordered to prepare an order no later than December 22, 2006.

The case management conference currently set on March 1, 2007 is ordered advanced to this date and vacated.

The court sets a status conference regarding arbitration on June 19, 2007, at 8:30 a.m. in Department 48.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of December 19, 2006 upon counsel named below by depositing in the United States Mail at the courthouse in Los Angeles, California, a copy of the original entered herein in sealed envelopes, addressed as shown below, with the postage thereon fully prepaid.

Henry D. Lederman, Esq.
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Walnut Creek, California 94596

Douglas B. Hayes, Esq.
Law Offices of Joseph M. Lovretovich
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Date: December 19, 2006

JOHN A. CLARKE, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles

By: /s/ A. Barton
A. Barton, Judicial Assistant

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

CASE NUMBER: 3:07-cv-00050-LRH-RAM

ANTONIO JACKSON,
Plaintiff,

v.

RENT-A-CENTER WEST, INC.,
Defendant.

JUDGMENT IN A CIVIL CASE

— Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

— Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Proceedings and Compel Arbitration (#6) is GRANTED.

June 7, 2007

LANCE S. WILSON
Clerk

/s/ Daniel R. Morgan
Deputy Clerk

PETITIONER'S BRIEF

No. 09-497

Supreme Court, U.S.
FILED
FEB 25 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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BOTH SEQ6BI

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QUESTION PRESENTED

Whether a district court or an arbitrator should decide claims that an arbitration agreement under the Federal Arbitration Act ("FAA") is unconscionable, when the parties to the agreement have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Rent-A-Center, West, Inc. was the defendant in the district court and the appellee in the court of appeals.

Antonio Jackson was the plaintiff in the district court and the appellant in the court of appeals.

Petitioner Rent-A-Center, West, Inc. previously filed a corporate disclosure statement pursuant to Rule 29.6 with the petition for writ of certiorari. No amendments to the prior statement are necessary at this time.

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IN THE

Supreme Court of the United States

No. 09-497

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

Rent-A-Center, West, Inc. ("Petitioner" or "RAC") respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit with instructions to enforce the parties' arbitration agreement as written to permit the arbitrator, and not the district court, to determine the claims of unconscionability advanced by Respondent Antonio Jackson ("Respondent" or "Jackson").

OPINIONS BELOW

The decision of the court of appeals, affirming in part, reversing in part, and remanding to the district court, is published at 581 F.3d 912 (9th Cir. 2009),

and is reproduced at Pet. App. 7a-24a.[1] The opinion of the district court granting RAC's Motion to Dismiss Proceedings and Compel Arbitration on the ground that the parties' arbitration agreement clearly and unmistakably vested the arbitrator with the authority to decide Jackson's claims of unconscionability is unpublished and is reproduced at Pet. App. 1a-6a.

JURISDICTION

The Ninth Circuit's judgment was entered on September 9, 2009. The petition for writ of certiorari was filed on October 27, 2009, and was granted on January 15, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

The appendix to RAC's Petition for a Writ of Certiorari contains the relevant statutory provisions, namely, 9 U.S.C. §§ 2 and 4.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unmistakable terms of an arbitration agreement governed by the Federal Arbitration Act, ("FAA"), 9 U.S.C. § 1 *et seq*. The arbitration agreement in this case expressly states that: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any

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[1] The Appendix filed by Petitioner with its petition for writ of certiorari is referred herein as "Pet. App." The Joint Appendix filed with this merits brief is referred to herein as "Jt. App."

part of this Agreement is void or voidable." Jt. App. 34a.[2] Despite the parties' clear and unmistakable agreement that the arbitrator possessed exclusive authority to decide a claim of unenforceability due to alleged unconscionability, the Ninth Circuit held, as a matter of law, that the unconscionability determination is exclusively for a court and the parties can never assign that function to an arbitrator in the first instance: "This rule applies even where the agreement's express terms delegate that determination to the arbitrator." Pet. App. 18a. That holding is wrong and should be reversed.

Congress enacted the FAA for the "central purpose" of ensuring that private agreements to arbitrate are enforced according to their terms. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of a "contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Parties to arbitration agreements under the FAA are therefore "generally free to structure their arbitration agreements as they see fit" and can "specify by contract the rules under which [the] arbitration may be conducted." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

As a result, this Court has held that arbitration agreements that clearly and unmistakably evince the parties' intent to assign the determination of arbitra-

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[2] The Arbitration Agreement may also be found at Pet. App. 25a-34a.

bility to the arbitrator and not the courts are fully enforceable. *See First Options of Chicago, Inc. v. Kaplan* ("*First Options*"), 514 U.S. 938, 943 (1995) (question of who has the primary power to decide arbitrability "turns upon what the parties agreed about *that* matter" (emphasis in original)); *AT&T Technologies, Inc. v. Communications Workers* ("*AT&T*"), 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability). The Ninth Circuit's decision in this case dismisses these important principles and requires courts to disregard the plain language of the arbitration agreement merely because one party later claims that the agreement is unfair.

A. The Arbitration Agreement

On February 24, 2003, Jackson and RAC entered into a Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement") arising out of their employment relationship. Jt. App. 29-38. Under the Arbitration Agreement, Jackson and RAC mutually agreed that all claims that each might have against the other relating to Jackson's employment or the termination of his employment would be submitted to binding arbitration. Jt. App. 29-30. In addition to giving the arbitrator the authority to apply the substantive law applicable to the claims asserted in arbitration and to award any remedies to which the claimant might be entitled, the Arbitration Agreement clearly stated: "The Arbitrator, and not any federal, state, or local court or agency, shall have *exclusive authority* to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this

Agreement is void or voidable." Jt. App. 34 (emphasis added).[3]

In signing the Arbitration Agreement, Jackson acknowledged that he carefully read the agreement, understood its terms, and did not rely upon any promises or representations other than those contained therein. Jt. App. 37-38. Jackson additionally acknowledged that he had "BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO." Jt. App. 38 (all capitals in original).

B. RAC's Motion to Compel Arbitration

Despite the fact that he expressly agreed in the Arbitration Agreement that he would arbitrate all claims arising out of his employment with RAC, including claims regarding the validity of the Arbitration Agreement itself, Jackson filed a complaint in the United States District Court for the District of

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[3] As stated in Judge Hall's dissent below, the Arbitration Agreement in this case is relatively "favorable to the employee * * *." Pet. App. 21a. Thus, the parties can propound requests for production of documents, take depositions and issue subpoenas; they have the right to receive notice of the witnesses and exhibits their opponent will offer at least thirty days prior to hearing; they have the right to fully participate in the selection of fair and unbiased arbitrators under the rules of respected arbitration providers such as the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS"); they have the right to have an attorney represent them; they are entitled to the benefits of all substantive law and legal remedies as if their claims were being pursued in court; and they are entitled to a written award by the arbitrator that includes the factual and legal reasoning upon which it is based. Jt. App. 32-35.

Nevada on February 1, 2007, alleging race discrimination and retaliation under 42 U.S.C. § 1981. Jt. App. 6-9. Jackson alleged that RAC initially failed to promote him because of his race, then promoted him, and then terminated his employment a few months after his promotion, allegedly due to retaliation for his prior complaints about not being promoted earlier. Jt. App. 7-8. The district court possessed federal question jurisdiction over Jackson's claims under 28 U.S.C. § 1331.

On March 14, 2007, RAC filed its Motion to Dismiss Proceedings and Compel Arbitration. Jt. App. 10. In support of that motion, RAC relied upon its memorandum of law as well as a declaration from its custodian of records attaching a copy of the signed Arbitration Agreement. Jt. App. 11-38. In its memorandum of law, RAC contended that Jackson's claims of race discrimination and retaliation were "indisputably covered under the clear and unambiguous terms of the Arbitration Agreement signed by Plaintiff, and therefore, must be submitted to binding arbitration." Jt. App. 13.

RAC further argued that "any attempts by Plaintiff to claim that the Arbitration Agreement does not apply to some or all of his claims or is otherwise unenforceable" were not properly before the district court because Jackson had agreed that the arbitrator, and not any court, possessed "*exclusive authority* to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of the agreement is void or voidable." Jt. App. 14-15 (emphasis in original). In this regard, RAC argued that any attempt by Jackson to claim that the Arbitration Agreement was void or

voidable because of "alleged formation defects or due to alleged unconscionability must also be decided by the arbitrator, and not the Court." Jt. App. 16. After a full discussion of the grounds for enforcement of the Arbitration Agreement under both the FAA and Nevada arbitration law, RAC requested "an order dismissing the lawsuit by Plaintiffs [sic] in its entirety or, in the alternative, staying these proceedings and compelling the arbitration of Plaintiffs claims in accordance with the Arbitration Agreement." Jt. App. 26.

On March 20, 2007, Jackson filed his opposition to RAC's motion to compel arbitration. Jt. App. 39. Jackson did not submit any declarations or other factual support for his opposition, relying solely on his memorandum of points and authorities. *Id.* In his opposition memorandum, Jackson contended that the Arbitration Agreement that he admittedly signed was "unenforceable in that it is unconscionable." Jt. App. 40. Jackson argued both procedural and substantive unconscionability. He contended that the Arbitration Agreement was procedurally unconscionable only because he was allegedly "in a position of unequal bargaining power and was presented with offending contract terms without an opportunity to negotiate * * *." Jt. App. 42. Citing mostly California and not Nevada law regarding unconscionability, Jackson contended that the Arbitration Agreement was substantively unconscionable because it was allegedly one-sided, placed limits on discovery, and contained a provision permitting sharing of the costs of the arbitration procedure if such sharing was permitted by state law. Jt. App. 42-44. Jackson did not address in any way RAC's contention in its motion to compel that any claim that the Arbitration

Agreement was unenforceable was reserved for the arbitrator and not the court. Jt. App. 40-47.

On April 3, 2007, RAC filed its reply to Jackson's opposition. Jt. App. 48. RAC first argued that Plaintiff's opposition "fails to rebut or otherwise address in any way Defendant's argument that the Arbitrator must decide Plaintiff's challenge to the enforceability of the Agreement." Jt. App. 50. RAC therefore urged the district court to grant its motion to compel because the parties had clearly and unmistakably agreed that Jackson's claim that the Arbitration Agreement was unenforceable was reserved exclusively for the arbitrator. Jt. App. 51.

Alternatively, in the event the district court reached the merits of Plaintiff's unconscionability defense, RAC argued that under Nevada law an employer may require an employee to sign an employment contract as a condition of employment. *Id.* Therefore, Plaintiff's allegation that the Arbitration Agreement was procedurally unconscionable merely because it was presented as a condition of employment without negotiation was insufficient as a matter of Nevada law. *Id.* In this regard, RAC noted that Jackson did not allege (1) that RAC misrepresented the terms of the Arbitration Agreement; (2) that he was deprived of an opportunity to review its terms; or (3) that its terms were hidden or inconspicuous. *Id.* RAC also contended that the Arbitration Agreement was not substantively unconscionable because it was bilateral in nature, adopted the law of Nevada regarding arbitration fees and costs, and permitted reasonable discovery by both parties. Jt. App. 52-57.

C. The District Court's Decision

On June 6, 2007, the district court granted RAC's motion, compelling arbitration and dismissing Jackson's lawsuit. Citing *First Options*, the district court found that the Arbitration Agreement "clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." Pet. App. 4a. The district court ruled that "[a]s such, the question of arbitrability is a question for the arbitrator." *Id.*

The district court further ruled that even if it "were to examine the merits of Plaintiff's assertion of unconscionability, there appears to be a lack of evidence to suggest an unconscionable agreement." Pet. App. 5a. Noting that Nevada law requires a showing of both procedural and substantive unconscionability to preclude enforcement of an arbitration agreement, the court held that "there appears to be nothing to suggest substantive unconscionability." *Id.*[4] Because the district court did not find the Agreement to be substantively unconscionable, the court did not reach the issue of procedural unconscionability. Pet. App. 5a-6a.

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[4] In so ruling, the district court stated that the cost provision of the Arbitration Agreement was not substantively unconscionable because Jackson had "offered no evidence to demonstrate a likelihood of overly burdensome expense." Pet. App. 5a. As further support for its ruling, the district court also noted that the "agreement to arbitrate expressly contains a clause allowing the apportionment of costs to be altered in the event the law requires a different allocation of costs to make the Agreement enforceable." *Id.*

D. The Ninth Circuit's Decision

Jackson appealed the district court's order and judgment dismissing his case and compelling arbitration to the Ninth Circuit.[5]

In a 2-1 decision, the court of appeals affirmed in part, reversed in part, and remanded to the district court. Pet. App. 20a. The Ninth Circuit acknowledged that it was undisputed that the agreement clearly and unmistakably assigned the question of contract validity to the arbitrator. Pet. App. 13a. However, in reversing the order to arbitrate, the court held that the *mere allegation* that an arbitration agreement is unconscionable required the district court, and not the arbitrator, to determine that issue, notwithstanding the parties' express agreement to the contrary. Pet. App. 15a. The court affirmed the district court's finding that the Arbitration Agreement's cost provision was not substantively unconscionable but remanded for the district court to rule on Jackson's two other substantive unconscionability claims, holding that if Jackson demonstrated the provisions were substantively unconscionable, the district court should address his claim of procedural unconscionability. Pet. App. 18a-20a.

Specifically, the Ninth Circuit ruled:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even*

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[5] The Ninth Circuit possessed appellate jurisdiction under 28 U.S.C. § 1291.

where the agreement's express terms delegate that determination to the arbitrator.

Pet. App. 17a-18a (emphasis added).

Judge Hall dissented, stating that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, even when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a (emphasis in original). Judge Hall observed that the ruling was contrary to this Court's decisions in *First Options* and *AT&T Technologies*, making it "difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'" Pet. App. 22a. While noting that "everyone agrees that unconscionable arbitration agreements should not be enforced," Judge Hall stated, "[a]t issue here is *who* should decide if the agreement is unconscionable when the parties' agreement gives the question to the arbitrator." Pet. App. 24a, n. 5 (emphasis in original).

SUMMARY OF ARGUMENT

The FAA's primary purpose is to enforce arbitration agreements in accordance with their terms. *Volt*, 489 U.S. at 479. Congress enacted the FAA to overcome historic judicial hostility to arbitration and replace that hostility with a "liberal federal policy favoring arbitration agreements * * *." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Arbitration agreements covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, courts must enforce agreements to arbitrate "in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4. This Court has held that where, as here, the parties "clearly and unmistakably" agree to delegate the issue of arbitrability to the arbitrator, their agreement must be honored. *First Options*, 514 U.S. at 943-44; *AT&T*, 475 U.S. at 649. The Ninth Circuit disregarded these principles in refusing to enforce the parties' agreement, on a mere assertion of unconscionability, even though that agreement "clearly and unmistakably" referred the issue of contract enforceability to the arbitrator in the first instance.

What this Court has stated plainly is that courts must decide whether the parties objectively revealed their intent to submit the arbitrability issue to the arbitrator and if they have, then arbitration is the proper forum for deciding those issues. *First Options*, 514 U.S. at 944. The point of the *AT&T/First Options* requirement that issues normally reserved for the court can be referred to the arbitrator only by clear and unmistakable language is that, absent such language, it will be presumed that the parties did not intend to refer such issues to the arbitral forum. *Id.* at 945.

Unless that presumption is irrebuttable, which it clearly is not, then this Court's statements in *AT&T* and *First Options* mean that if the parties are crystalline in expressing their intention to have enforceability issues decided by the arbitrator, then the courts should respect that judgment. Otherwise, those

statements are meaningless and the numerous arbitration agreements that have been entered into in reliance on them have been rendered equally meaningless.

Both the district court and the Ninth Circuit concluded that the parties' agreement "clearly and unmistakably" committed the unconscionability issue to the arbitrator. Pet. App. 4a, 13a. When the Ninth Circuit refused to enforce that language based on a *mere allegation* of unconscionability, it created a rule that the whim of a party opposing arbitration was sufficient to erase the words contained in the arbitration agreement. This approach embodies nothing less than the historical hostility to arbitration that led to the passage of the FAA in the first place.

Jackson argued in opposition to RAC's petition for certiorari that arbitrators simply cannot be trusted to rule on the validity of the contract to arbitrate. Opp. 8-9. However, this argument runs contrary to the FAA's rejection of the presumption of arbitral bias, which had enflamed judicial hostility to arbitration prior to the Act's passage. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

It is very difficult to understand the Ninth Circuit's logic in placing beyond the power of an arbitrator decisions on mundane issues of state law, such as unconscionability, when this Court has held that Congress is completely comfortable allowing the enforcement of fundamental anti-discrimination statutes, such as Title VII and the Age Discrimination in Employment Act, to be resolved through the arbitral process. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (Congress did not intend to preclude arbitration of ADEA claims). The whole

point of arbitration is that it is a different forum for resolving the same substantive issues that courts decide. There certainly is no reason to believe that an arbitrator would be more or less capable of deciding whether the contract was unconscionable than whether Jackson was the victim of race discrimination or retaliation. Accordingly, other than the impermissible and long discredited presumption of arbitral bias Respondent urges upon this Court, no valid statutory or policy reason exists for refusing to enforce the language contained in the parties' agreement.

In this case, there is no dispute that Jackson (1) signed the Arbitration Agreement; (2) it covers his claims for relief; (3) it refers the issue of unconscionability to the arbitrator; and (4) it does so in clear and unmistakable language. Accordingly, the court of appeals erred in refusing to enforce the agreement in accordance with its terms, as required by sections 2 and 4 of the FAA. 9 U.S.C. §§ 2 and 4.

ARGUMENT

A. Under the FAA, Arbitration Agreements Are Enforced as Written.

At stake in this case are the FAA's core principles, found both in its text and this Court's long-standing interpretations of that statute. The "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479. *See also Mastrobuono*, 514 U.S. at 53-54 (1995) (enforcement of arbitration agreements "according to their terms" is the "central purpose" of the FAA); *Dean Witter Reynolds Inc. v. Bryd*, 470 U.S. 213, 220 (1985) (passage of the FAA "was motivated, first and foremost, by a congres-

sional desire to enforce [arbitration] agreements into which parties had entered"). "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of a transaction in interstate commerce "*shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Section 2 of the FAA "is the primary substantive provision of the Act * * *." *Moses H. Cone*, 460 U.S. at 24. It is the "centerpiece provision" of the FAA, *Mitsubishi Motors Corp.*, 473 U.S. at 625, and sets forth a "broad principle of enforceability," *Perry v. Thomas*, 482 U.S. 482, 489 (1987).

"Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. The liberal federal policy embodied in section 2 "is at bottom a policy *guaranteeing* the enforcement of private contractual arrangements * * *." *Mitsubishi Motors*, 473 U.S. at 625 (emphasis added). *See also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 201 (2000) (the FAA sets forth a "statutory policy of rapid and unobstructed enforcement of arbitration agreements" (quoting *Moses H. Cone*, 460 U.S. at 23)). Thus, the "preeminent concern of Congress in passing the Act" requires courts to

"rigorously enforce agreements to arbitrate * * *." *Dean Witter Reynolds, Inc.*, 470 U.S. at 221.

The effect of section 2 "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Perry*, 482 U.S. at 489, (quoting *Moses H. Cone*, 460 U.S. at 24). Thus, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25. More than 20 years ago, this Court held: "By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.*, 470 U.S. at 218 (emphasis in original). And in deciding whether an "agreement to arbitrate is unenforceable," courts should be ever "mindful of the FAA's purpose" to reverse the longstanding judicial hostility to arbitration agreements. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89 (2000).

That arbitration agreements may be structured to commit particular issues to the arbitrator likewise cannot be doubted. This core principle finds direct textual support in the FAA. For example, section 4 of the Act provides that a party may obtain an order compelling arbitration "in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4. Similarly, section 3 of the FAA authorizes federal courts to stay litigation until the arbitration has been conducted "in

accordance with the terms of the [parties' arbitration] agreement * * *." 9 U.S.C. § 3.

As this Court only recently reiterated, it "is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, *including* the way arbitrators are chosen, what their qualifications should be, *which issues are arbitrable*, along with procedure and choice of substantive law." *Hall Street Associates, L.L.C.*, 552 U.S. at 586 (emphasis added). As explained in *Volt*: "Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted * * *." *Volt*, 489 U.S. at 479 (citations omitted).

By its frequent holdings emphasizing that the central purpose of the FAA is the enforcement of the parties' agreement as written, this Court has created a strong presumption of enforceability of arbitration agreements, which can only be overcome by clearly enunciated federal law militating against enforcement. *See, e.g., Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 n.1 (1998) (citing *Mitsubishi Motors*, the Court stated that "we have also discerned a presumption of arbitrability under the FAA"); *Gilmer*, 500 U.S. at 26 (1991) ("having made the bargain to arbitrate, the party should be held to it" unless it can shoulder the burden "to show that Congress intended to preclude a waiver of a judicial forum * * *"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) ("the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies * * *").

For example, in *Hall Street*, this Court held that sections 9, 10 and 11 of the Act, 9 U.S.C. §§ 9, 10, 11, constituted "textual features at odds with enforcing a contract to expand judicial review following the arbitration" and that these textual features overcame the "general policy of treating arbitration agreements as enforceable * * *." *Hall Street Assocs., L.L.C.*, 552 U.S. at 586. However, barring situations in which the "statutory text" of the FAA or some other federal law prohibits enforcement of the terms of the arbitration agreement, nothing in *Hall Street* or any other case from this Court weakens the well-established and long-standing principle that the parties are otherwise free to tailor the features of their arbitration agreement as they see fit, including the issue of "which issues are arbitrable," and that their agreement will be fully enforceable. *Id.*

These core principles are at stake in this case because Jackson has done nothing to overcome the strong presumption that the Arbitration Agreement here is fully enforceable according to its terms. Jackson signed the Arbitration Agreement on February 24, 2003, and he has asserted no issues regarding its execution. The document he signed plainly is an "agreement" to arbitrate disputes relating to his employment with RAC. Jackson acknowledged that he carefully read the agreement, understood its terms and had the opportunity to discuss it with counsel of his choice; he concedes that the agreement covers the claims raised in his complaint; and, pertinent to the issue before this Court, he concedes that the enforceability of the agreement or whether any portion of it was void or voidable was clearly and unmistakably committed to the arbitral forum. Indeed, as to this last point, the Ninth Circuit recognized the clear import of the agreement itself. *See*

Pet. App. 13a.[6] In sum, Jackson does nothing to shoulder his burden of establishing that the arbitral forum is unavailable to him or that the enforceability issues he has raised are unsuitable for arbitration. *See Randolph*, 531 U.S. at 91-92 (party opposing arbitration must establish that it is unable to vindicate its rights in the arbitral forum or that the claims at issue "are unsuitable for arbitration").

Despite the lack of any showing by Jackson, and notwithstanding the clarity of the agreement and its undisputed reference of the unconscionability issue to the arbitrator, the Ninth Circuit refused to enforce the contract in accordance with its terms, holding instead "that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator.*" Pet. App. 17a-18a (emphasis added).

The Ninth Circuit's ruling does clear violence to the FAA as interpreted by this Court's decisions outlined above. To support its conclusion, the Ninth Circuit

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[6] The Ninth Circuit stated that "Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator." Pet. App. 13a. Therefore, the only issue before this Court is the validity *vel non* of the agreement of the parties to assign unconscionability to the arbitrator; no other issues were raised by Jackson in the district court, the court of appeals or in his opposition to certiorari. *See 14 Penn Plaza LLC v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456, 1473-74 (2009) (rejecting argument made for the first time before this Court that the contract did not "clearly and unmistakably" require respondents to arbitrate ADEA claims).

relied upon its own view of "the proper role of cooperative federalism," Pet. App. 15a, but this is just an expression of judicial hostility to arbitration in another guise. Congress clearly did not believe that the same arbitrators who were fully capable of deciding federal issues of overriding significance, including those arising under antidiscrimination and antitrust laws, lacked the capability or authority to decide ordinary questions of state law, like unconscionability. The Ninth Circuit's effort to elevate unconscionability above all other issues, and to place it as a matter of law beyond the arbitrator's authority to decide simply has no basis in the FAA or this Court's holdings.

The Ninth Circuit's ruling is flatly incompatible with the *AT&T/First Options* rule that clear and unmistakable agreements to commit gateway issues to the arbitral forum are fully enforceable under the FAA. In fact, the ruling below, which would require a preliminary "mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability," Pet. App. 22a (dissenting opinion), even when that issue has been assigned to an arbitrator, runs further afoul of the FAA by "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995). Rather than requiring such a mini-trial, proper application of the FAA should result in "unobstructed enforcement" of the parties' agreement to submit any disputes regarding contract validity or enforceability to the arbitrator for a prompt and fair decision. *Moses H. Cone*, 460 U.S. at 23.

B. The *AT&T/First Options* Rule Governs this Case.

1. Contract Validity Is a Gateway Issue that Can Be Submitted to the Arbitrator by Clear and Unmistakable Language in the Arbitration Agreement.

While there is a heavy presumption in favor of the enforcement of arbitration agreements and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Mitsubishi Motors*, 473 U.S. at 626, this Court has nonetheless recognized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The *AT&T/First Options* rule has thus been applied to ensure that "gateway" questions of arbitrability that would normally be decided by the court will not be submitted to the arbitrator unless the parties clearly and unmistakably agree. This rule furthers the FAA's central purpose of enforcing arbitration agreements as written and has direct application in this case, where it is undisputed that the Arbitration Agreement in no uncertain terms authorized the arbitrator to decide issues of contract enforceability.

Normally, in deciding whether to compel arbitration, a trial court is charged with determining two "gateway" issues: (1) whether there is an agreement between the parties to arbitrate; and (2) whether that agreement covers the particular dispute between them. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to

decide." *Id.* Put another way, the broad question "whether the parties have a valid arbitration agreement at all" is a classic gateway issue normally to be decided by the court. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

Inasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (unconscionability is a "generally applicable" contract defense); *Bazzle*, 539 U.S. at 452 (courts decide issue of arbitration agreement's validity unless parties clearly and unmistakably provide otherwise). Stated differently, absent anything in the agreement on the issue, the parties would have expected the question to be one for the court and not an arbitrator. The district court and the Ninth Circuit therefore properly treated Jackson's claim of unconscionability as a gateway issue, which would normally, but for the parties' agreement, be decided by the court. Pet App. 4a, 13a-15a.

The Ninth Circuit erred, however, when it failed to follow the *AT&T/First Options* rule, and instead created out of whole cloth an exception to that rule for *any* claim of unconscionability, no matter how weak. That holding is indefensible.

In *AT&T*, a labor arbitration case, this Court stated, in reliance on the *Steelworkers Trilogy*,[7] that

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[7] The *Steelworkers Trilogy* consists of *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

"the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649. However, citing a long line of prior cases, the Court in *AT&T* stated an exception to this general rule: "*Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (emphasis added). By its statement of the exception to the general rule, the Court in *AT&T* made clear that the parties possessed the power to vest the arbitrator by clear contract language with the authority to decide arbitrability and thus "determine his own jurisdiction * * *." *Id.* at 651.

In *First Options*, this Court applied the *AT&T* rule to an arbitration proceeding under the FAA and described in detail the role of the court when deciding whether a party has agreed to arbitrate arbitrability. *First Options*, 514 U.S. at 944. This Court held, citing *AT&T*, that courts "should not assume that the parties agreed to arbitrate arbitrability" in the absence of clear and unmistakable evidence that they did so. *Id.*[8] Instead, the trial court "should apply ordinary state-law principles that govern the formation of contracts" to determine if this clear and unmistakable evidence exists. *Id.* In *First Options*, "[t]he relevant state law here, for example, would require the court to see whether the parties objec-

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[8] The requirement that the language be "clear and unmistakable" exists because "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945.

tively revealed an intent to submit the arbitrability issue to arbitration." *Id.*

The trial court's role as articulated in *First Options* is therefore merely to determine whether the parties' contract expresses in clear and unmistakable language that the arbitrator will determine gateway issues of arbitrability. Here, both courts below held that the language of this Arbitration Agreement contains such language giving the arbitrator the power to decide issues of contract enforceability, including unconscionability. *See* Pet. App. 4a ("The Agreement to Arbitrate clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable."); Pet. App. 13a ("In contrast to *First Options*, we are not presented with 'silence or ambiguity on the "who should decide the arbitrability point."' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator.") The *AT&T/First Options* principle thus controls and the Arbitration Agreement should be enforced as written, with the issue of contract enforceability determined by the arbitrator.

2. The Ninth Circuit's Holding Is Incompatible With *AT&T/First Options*

By concluding that, notwithstanding clear and unmistakable terms, a mere allegation of unconscionability prevents those terms' enforcement, the Ninth Circuit created an exception to *AT&T/First Options* that swallows the rule. As Judge Hall stated in dissent, "The exception [created by the majority] begins to look very much like the general rule in that courts will be deciding the question of agreement validity under both scenarios, regardless of what the

agreement's language might say about the chosen forum for that question." Pet. App. 22a.

In support of its holding, the Ninth Circuit relied on *Buckeye*. Pet. App. 11a-12a. In *Buckeye*, this Court held that, when a party challenges the validity of a contract, but not specifically its arbitration provisions, the challenge to the contract's validity should be considered by an arbitrator, not a court. *Buckeye*, 546 U.S. at 446. The flip side of this rule is that when a party challenges the validity of the arbitration provision itself, separate from the validity of the overall contract, a court normally decides the threshold question of enforceability of the arbitration provision. *Id. See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in the inducement of the contract as a whole was to be decided by the arbitrator but fraud in the inducement of the arbitration provision itself was for the court).

However, neither *Buckeye* nor *Prima Paint* addressed the issue posed in this case, whether a question regarding the validity of a few clauses contained within an arbitration agreement can be appropriately delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. Therefore, the Ninth Circuit's reliance on *Buckeye* stretches the holding in that case beyond its proper limits and creates a false tension with the principles of *AT&T* and *First Options*, which fully support enforcement of the parties' express agreement.[9]

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[9] Unlike *Prima Paint*, this case does not involve any issue regarding the "making of the agreement for arbitration" under 9 U.S.C. § 4. *See Prima Paint*, 388 U.S. at 403-04 (allegation of fraud in the inducement "goes to the 'making' of the agreement

The Ninth Circuit adopted, without precedent, a blanket rule that a claim that an arbitration agreement is invalid because it is unconscionable cannot under any circumstances be decided by an arbitrator. This blanket rule is contrary to decisions of this Court holding that the default rule normally requiring "gateway" issues to be decided by the trial court is trumped by a clear and unmistakable agreement that such issues are to be decided by the arbitrator. The Ninth Circuit's decision to create out of "whole cloth" an exception to this Court's holdings if there is merely a *claim* of unconscionability conflicts directly with the core principles of the FAA, namely, that agreements must be enforced in accordance with their terms, that arbitrators may decide gateway issues if these issues are clearly and unmistakably referred to arbitration, that arbitration can be trusted as a means for resolving disputes, and that courts must refer parties to arbitration "in the manner provided for" in their agreement. 9 U.S.C. § 4.

While Jackson may argue that the Ninth Circuit's rule is more limited because it only applies where an individual claims he had no real choice but to agree to a contract's terms, the dissent exposed the fallacy of this argument by noting that the Ninth Circuit's

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to arbitrate * * * "). In this case, Jackson does not allege fraud nor does he allege that he did not execute the Arbitration Agreement. *See Buckeye*, 546 U.S. at 444 n.1 ("[t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded"). Rather, he merely alleges that the fact that the Agreement was required as a condition of employment and contains a few provisions that he claims are unfair makes the agreement unenforceable. Whether he is correct in that claim is a matter that an arbitrator unquestionably is as suited to decide as a court.

new rule is triggered by "just the bare allegation of unconscionability," whether procedural or substantive. Pet. App. 22a. Thus, "clear and unmistakable" language vanishes from the agreement at the whim of a party resisting arbitration. Moreover, there is clearly nothing in the statute that distinguishes between various parties in deciding what issues can be decided by an arbitrator. In trying to make such a distinction, the decision below merely reflects the majority's doubts that an arbitrator will decide the issue "correctly." But this is just another indication of the court's hostility to arbitration.

The aim of *AT&T* and *First Options* is that gateway issues ordinarily committed to the court and perhaps not expected to be subject to arbitration may nonetheless be sent to arbitration so long as the language of the agreement makes it clear that arbitration is the forum for resolution of that dispute. Those gateway issues include the very issues (contract validity and coverage) that Jackson claims cannot, but this Court has held may, be entrusted to arbitrators. *See Bazzle*, 539 U.S. at 452 ("whether the parties have a valid arbitration agreement at all" is a gateway issue).

3. Other Courts of Appeals Apply the *AT&T/First Options* Rule to Claims of Unconscionability.

Rather than creating without statutory or other support a broad exception to the *AT&T/First Options* rule as the Ninth Circuit has done, other courts of appeals have respected and followed the rule even when the question of arbitrability involves a claim of unconscionability. *See, e.g., Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 13 (1st Cir. 2009) (court held that unconscionability, which is "essentially a

fairness issue," is delegated to the arbitrator by clear and unmistakable language); *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 624-25 (8th Cir. 2006) (contention that "it would be unconscionable" to arbitrate is delegated to the arbitrator by clear and unmistakable evidence); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1331 (11th Cir. 2005) (argument that "remedial restrictions [in arbitration agreement] are, in fact, unenforceable-either because they defeat the remedial purpose of another federal statute * * * or because they are invalid under generally applicable state contract law" is for the arbitrator); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003) (assuming that the grounds for revocation under section 2 of the FAA included plaintiff's claims that the agreement was invalid based on alleged unfairness of various substantive provisions, court concluded that these claims were for the arbitrator).

First Options and *AT&T* hold that issues such as contract coverage and validity, normally for the court, can be sent to arbitration by the parties. Other circuits uniformly recognize that "clear and unmistakable" language in an arbitration agreement sending these issues to the arbitrator is not erased by a mere claim of unconscionability. The Ninth Circuit stands alone in creating, without support in the statutory language or this Court's precedents, an exception to the *AT&T/First Options* rule which permits clear and unmistakable contract language to be rendered a nullity not where the party is deprived of an opportunity to have its unconscionability defense decided by an arbitrator but simply because

of a bare claim that a provision in the agreement may be unfair.[10]

4. The Ninth Circuit's "Meaningful Assent" Test Is Unsupportable.

Jackson argued below that he should not be held to the terms of the Arbitration Agreement because "of the parties' unequal bargaining power, the fact that the Agreement was presented as a non-negotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the agreement * * *." Pet. App. 14a. Thus, he contended that "he did not meaningfully assent to the Agreement." *Id.* This argument motivated the Ninth Circuit to "hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to

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[10] The Ninth Circuit's attempt to find support in the First Circuit's decision in *Awuah* is misplaced. Pet. App. 17a. *Awuah* fully embraces the principle that parties can clearly and unmistakably vest the arbitrator with power to "decide challenges to his own authority," including claims of unconscionability. *Awuah*, 554 F.3d at 11. However, the court further held that, where the party opposing arbitration contends that the arbitral remedy is "illusory," the trial court would be tasked to determine whether the opponent of arbitration could meet the "high" standard of establishing that the arbitration regime was "structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." *Id.* at 13 (emphasis added). *Awuah* cannot support the Ninth Circuit's decision here because Jackson made no showing below that the arbitral remedy was "illusory" or that he had no opportunity to obtain a decision from an arbitrator regarding his unconscionability defense.

the agreement, the threshold question of unconscionability is for the court." Pet. App. 15a.[11]

The Ninth Circuit's holding is flawed, finds no basis in the language of the FAA, and is out of step with this Court's precedents. As stated above, nothing in the FAA provides that an agreement to vest the arbitrator with the power to decide issues of arbitrability, including issues of contract validity, is not subject to the FAA's "broad principle of enforceability." *Perry*, 482 U.S. at 489. In fact, the *AT&T/First Options* rule establishes that such an agreement is fully enforceable so long as it is manifested, as it is here, objectively in a "clear and unmistakable" manner under generally applicable state contract law. *First Options*, 514 U.S. at 944.

The Ninth Circuit's application of a subjective "meaningful assent" test despite there being no issue raised over the making, signing, clarity or applicability of the Arbitration Agreement or its clause sending unconscionability issues to the arbitrator is unsupportable. Indeed, it sets up a hurdle to the enforcement of the parties' agreement, based on one party's alleged subjective impressions, that does not exist in generally applicable Nevada law, which

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[11] Jackson merely *asserted* these points below without any evidence. The facts in the record do not support the argument. The agreement conspicuously solicited Jackson's acknowledgement that he read and understood its terms and further reminded him that he could speak to his private legal counsel to the extent he wished to do so. Jt. App. 37-38. He did not submit an affidavit or declaration in his own behalf in the proceedings below. It was his burden, not met here, to establish his defense to enforcement of the Arbitration Agreement. *See Randolph*, 531 U.S. at 92 (party seeking to invalidate agreement based on claim that arbitration would be prohibitively expensive bears burden of proof in that regard).

follows an objective approach to contract formation. *See Bergman v. Electrolux Corp.*, 558 F. Supp. 1351, 1353 (D. Nev. 1983) (under Nevada law mutual assent was manifested by the signatures on the written agreement); *James Hardie Gypsum (Nevada), Inc. v. Inquipco*, 929 P.2d 903, 906 (Nev. 1996) (contract cannot be avoided based on the subjective intentions or understandings of a party; "[t]he fact finder should look to objective manifestations of intent to enter into a contract."), *overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 35 P.3d 964, 968 & n.6 (Nev. 2001); *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970) ("Parties to a written arbitration agreement are bound by its conditions regardless of their subjective beliefs at the time the agreement was executed."). Thus, the "relevant state law here * * * would require the court to see *whether the parties objectively revealed an intent* to submit the arbitrability issue to arbitration." *First Options*, 514 U.S. at 944 (emphasis added). In this case, they clearly did so. *See also Restatement (Second) of Contracts* § 2(1) cmt. B (1981) ("manifestation of intention" adopts an "external or objective standard for interpreting conduct; *it means the external expression of intention as distinguished from undisclosed intention.*" (emphasis added)).

Moreover, Jackson cannot argue that state law of general applicability prohibits enforcement of clear and unmistakable language sending the unconscionability issue to the arbitrator. First, generally applicable Nevada contract law, even assuming that the agreement was, as Jackson alleged, a nonnegotiable condition of employment and hence adhesive, does not make the agreement unenforceable on the mere allegation that it is unconscionable. *See Mallin v.*

Farmers Ins. Exch., 839 P.2d 105, 118 (Nev. 1992) ("adhesion contracts are not unenforceable per se"); *cf. Kindred v. Second Judicial Dist. Court*, 996 P.2d 903, 907 (Nev. 2000) ("We have never applied the adhesion contract doctrine to employment cases.").

Second, "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.*" *Moses H. Cone*, 482 U.S. at 489 (emphasis added). *AT&T* and *First Options* are part of that "body of federal substantive law of arbitrability," which cannot be overridden by inconsistent state law.

Additionally, Jackson cannot credibly argue that the Arbitration Agreement, even if required as a "condition of his employment," Pet. App. 14a, conferred upon him no benefits in exchange for his agreement to arbitrate and was hence unsupported by consideration. For one thing, the Arbitration Agreement includes mutual promises to arbitrate, consideration enough to form a contract. Jt. App. 29. Likewise, taking his arguments at face value, Jackson received highly valuable consideration in exchange for his agreement to arbitrate—employment. A claim that he did not "meaningfully assent" to arbitrate when that agreement was, as he also alleges, a "condition of his employment" can only illogically mean that he did not "meaningfully assent" to become employed, a claim that is belied by the allegations that RAC gainfully employed him after he signed the agreement to arbitrate his disputes.

Moreover, the Arbitration Agreement by itself confers valuable benefits, such as "a speedy, impartial, final, and binding dispute-resolution procedure." Jt. App. 29. When Congress enacted the FAA, it had the interests of individuals, as well as businesses, in mind. *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 280 (addressing the FAA's legislative history). As the Court observed regarding an agreement to arbitrate employment disputes: "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Most recently, this Court in *14 Penn Plaza* stated that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 129 S. Ct. at 1471.

The Ninth Circuit's position is internally inconsistent as well. The court of appeals recognized that on remand the district court should determine whether the agreement was substantively unconscionable and, *only if so*, whether the agreement *also* is procedurally unconscionable. Pet. App. 20a n.3. Thus, on the one hand the Ninth Circuit refused to enforce the clear and unmistakable language of the agreement sending the issue of contract enforceability to the arbitrator because there was no "meaningful assent" to it but then recognized that the question whether the agreement to arbitrate was unenforceable due to procedural unconscionability had yet to be determined and might never even be reached if no substantive unconscionability were

found. It is thus clear that the Ninth Circuit's "meaningful assent" test is itself an illusion because, if the substantive terms of the agreement are held not to be harsh and impermissibly one-sided, no amount of "procedural unconscionability" will render the arbitration agreement unenforceable. *See D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004) (party opposing enforcement of arbitration agreement based on unconscionability must establish both procedural and substantive unconscionability).

The Ninth Circuit's reliance on the purported lack of "meaningful assent" to the "clear and unmistakable" language of the parties' Arbitration Agreement has its response in *AT&T/First Options*: The "assent" to submit the issue to the arbitrator becomes "meaningful" when the parties' agreement, as here, "clearly and unmistakably" resolves that issue. Because in this case it is indisputable that the language at issue meets that test, the *AT&T/First Options* rule must be applied and the agreement enforced as written.

C. Arbitrators Are Fully Capable of Fairly Deciding the Issues Presented Here.

With no basis in either the text of the FAA or this Court's cases interpreting that statute, Jackson is forced to rely on purported public policy concerns to justify the Ninth Circuit's refusal to enforce the Arbitration Agreement as written. However, even assuming that these concerns could override the FAA's presumption in favor of contract enforcement, which they cannot, they, in any event, have no substance. *See, e.g., Hall Street Assocs., L.L.C.*, 552 U.S. at 589 (whatever the policy "consequences of our holding," the Court is bound by the "statutory text" of the FAA).

Here, there are no adverse public policy consequences in permitting the arbitrator to determine the unconscionability claims being made by Jackson. Jackson made straightforward, garden variety claims below that the agreement was substantively unconscionable because it allegedly "contained one-sided coverage and discovery provisions and a provision specifying that the arbitrator's fee was to be equally shared by the parties." Pet. App. 9a. The Ninth Circuit easily addressed one of these issues in a few paragraphs. Pet. App. 18a-20a. There is no reason why an arbitrator could not do likewise.

However, in his opposition to the petition for writ of certiorari, Jackson claims that "public policy" requires that arbitrators not be trusted with these decisions because they have a "financial interest" in prolonging cases rather than disposing of them early. Opp. 8-9. At the outset, this argument proves too much because taken to its logical conclusion arbitrators then would be mistrusted when it comes to deciding *any* dispositive motion (including motions that a defendant might ordinarily bring, such as motions to dismiss or for summary judgment), because if granted, a case would terminate well short of a more "lucrative" trial-type hearing. *See, e.g., Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (under NASD rules, dispositive motions available in arbitration).

Following Jackson's argument, arbitrators likewise could not be trusted to decide whether an ambiguous agreement permits or precludes class actions, because there is a vast difference in complexity, and presumably, the amount of arbitrator's fees, between a single plaintiff case and one in which a plaintiff is allowed to represent the interests of tens, hundreds

or thousands of others. Of course, this Court just a few years ago committed that very issue of contract interpretation to the arbitral forum in *Bazzle*, holding that "[a]rbitrators are well suited to answer that question." *Bazzle*, 539 U.S. at 453.

Jackson's "public policy," if adopted, might also lead courts to hold that arbitrators, based on the assumption of self-interest and bias, cannot be trusted to render interim rulings relating to the scope of discovery, the length of a hearing, limitations on witnesses and the like because the arbitrator would be biased against simplicity and expedition in favor of a prolonged, unnecessarily complex case. The premise of the FAA, as addressed *supra*, is exactly the opposite: arbitration is supposed to be speedier and less costly than going to court.

In effect, Jackson's argument threatens to devastate arbitration by requiring frequent interlocutory interventions by a supervising court. If arbitrators "are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987), the arbitrator selected by the parties in this case can decide the relatively simple legal issue of whether certain parts of the Arbitration Agreement are unconscionable.[12] Clearly, Congress

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[12] Indeed, arbitrators (many of whom are former members of the judiciary) may decide cases under the Truth in Lending Act, the Securities Act of 1933, the Securities and Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act, and the Sherman Act, and they certainly can decide what the dissent below characterized as "run-of-the-mill" cases like Jackson's. Pet. App. 22a. *See Randolph*, 531 U.S. at 89 (gathering cases).

did not intend to allow arbitrators to enforce fundamentally important federal statutes like Title VII or the Sherman Act only to flatly prohibit them from deciding state law questions of unconscionability.

Moreover, Jackson's public policy argument conflicts with an unbroken line of this Court's cases rejecting the presumption of arbitrator bias. "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp.*, 473 U.S. at 634. *See also Randolph*, 531 U.S. at 89-90 ("generalized attacks" resting on "suspicion of arbitration" must be rejected); *Gilmer*, 500 U.S. at 30 (the "host of challenges to the adequacy of arbitration procedures" advanced by the employee constitute generalized attacks based on suspicion and are "far out of step with our current strong endorsement" of arbitration); *Rodriguez de Quijas*, 490 U.S. at 481 ("outmoded presumption of disfavoring arbitration proceedings" must be set aside). Indeed, "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232. That false assumption underlies the "public policy" suggested by Jackson, but it is itself contrary to public policy embodied in the FAA.

Enforcement of the express terms of the Arbitration Agreement in this case violates no provision of the FAA or other federal law. Nor does it violate any public policy. In fact, enforcement does the opposite: it furthers the strong federal policy in favor of arbitration and supports the salutary goals of the arbitration process, to bring about the expeditious, efficient, and final resolution of disputes while insuring principles of fundamental fairness.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Writ Of Certiorari to The United States Court Of Appeals for The Ninth Circuit

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STATUTES

The relevant statutory provisions, Sections 2, 4 and 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 4, and 10.

STATEMENT OF THE CASE

Factual Background. This dispute arises out of a racial discrimination and retaliation lawsuit against Petitioner Rent-A-Center West, Inc. ("Rent-A-Center"), a nationwide furniture and electronics rent-to-own company. Rent-A-Center hired Respondent Antonio Jackson, an African-American man, as an account manager in 2004. J.A. 7. Jackson repeatedly sought promotions to a higher position, but each time Rent-A-Center promoted non-African-American employees with less seniority. J.A. 7. Jackson complained to his store manager, other store managers, and the corporate human resources office. J.A. 7. Rent-A-Center eventually promoted him but then terminated him without cause within two months of the promotion. J.A. 7. On February 1, 2007, Jackson sued Rent-A-Center in federal court for racial discrimination and retaliation under 42 U.S.C. § 1981. J.A. 8-9.

The Arbitration Agreement. Rent-A-Center moved to dismiss the proceedings and compel arbitration under FAA Section 4, citing an arbitration clause it had required Jackson to sign when he was hired as

a condition of employment. J.A. 10, 12. According to Rent-A-Center, this arbitration clause requires Jackson to arbitrate all claims or controversies against Rent-A-Center, including any challenges to the enforceability or applicability of the arbitration clause itself. Specifically, Rent-A-Center relies on a provision stating that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." J.A. 34.

Rent-A-Center's arbitration clause also contains a number of provisions that specify how disputes between the parties are to proceed. First, the agreement enumerates the types of claims that are arbitrable and the types of claims for which Rent-A-Center reserves its right to proceed in court. Notably, "claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers' compensation, marital status, medical condition, handicap or disability)" are covered by the agreement, while "claims by [Rent-A-Center] for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information" are not arbitrable. J.A. 30-31.

Second, the arbitration clause contains a fee- and cost-splitting provision, which states that Rent-A-Center shall pay only half of "any filing fees and the

cost of the Arbitrator's fee," and that "[e]ach party shall pay for its own costs and attorneys' fees, if any." J.A. 35.

Third, the agreement limits the right to take discovery by allowing the deposition of only "one individual and any expert witness designated by another party," and limits written discovery to requests for production. J.A. 32.

Finally, the arbitration clause contains a judicial review provision stating that a party opposing the enforcement of an arbitration award may bring an action in court to set aside the award. J.A. 36. In contrast to the judicial review provision of the FAA, 9 U.S.C. § 10, Rent-A-Center's arbitration clause provides that "the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury." J.A. 36.

Respondent's Opposition to the Motion to Compel Arbitration. Jackson opposed Rent-A-Center's motion on the grounds that the company's arbitration agreement is procedurally and substantively unconscionable. J.A. 40.

Jackson argued that the clause is procedurally unconscionable because he was in a position of unequal bargaining power when it was imposed as a condition of employment. J.A. 41-42.

Regarding substantive unconscionability, Jackson argued that the agreement was impermissibly one-sided because (1) it lopsidedly obligated him to

arbitrate any claims he might have against the company (*e.g.*, tort claims, claims of discrimination or harassment based on race, sex, age or disability), yet gave Rent-A-Center the right to litigate common claims it may have against him, such as the unauthorized disclosure of trade secrets, in court (J.A. 42-43); and (2) the limits on depositions would unfairly benefit Rent-A-Center given Jackson's burden of proof on the discrimination claims, and the reality that evidence of racial and retaliatory intent typically is in defendants' hands and requires more than two depositions to prove. J.A. 43-44.

Jackson further challenged the arbitration agreement as substantively unconscionable because it included discovery provisions that limited written discovery to requests for production (J.A. 44) and required employees to pay for half of the arbitration fees with no cap. J.A. 43.

The Decisions Below. Less than three months after Rent-A-Center moved to compel arbitration, the district court granted the motion. Pet. App. 1a-6a. The district court held that the arbitration agreement was not substantively unconscionable because Jackson had not demonstrated a likelihood of overly burdensome arbitration expenses. Pet. App. 5a. The court did not reach Jackson's other unconscionability arguments.

The Court of Appeals reversed, holding that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that

he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." Pet. App. 15a. The court cited *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 446 (2006), for the proposition that challenges to the validity of a contract, but "not specifically its arbitration provisions" are for the arbitrator, not a court, to decide. Pet. App. 11a. The court held that the "flip side of this rule" is that challenges to the validity of an arbitration agreement, "apart from the validity of the contract as a whole," are threshold questions for the court to decide. *Id.* The court explained that the rationale for requiring courts to determine threshold challenges to the validity of arbitration provisions is that "arbitration is itself a matter of contract," which means that "a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *Id.* (citation omitted).

The court below also reversed the district court's alternative holding that Rent-A-Center's arbitration agreement was not unconscionable. Pet. App. 18a. The court held that the district court erred in failing to address two of Jackson's arguments regarding substantive unconscionability: namely, that the agreement's claim coverage and discovery provisions were one-sided. Pet. App. 19a-20a. The court below thus instructed the district court to complete its analysis of substantive unconscionability and, if it determined

that Rent-A-Center's clause was substantively unconscionable, to also determine whether the agreement was procedurally unconscionable. Pet. App. 20a.

SUMMARY OF ARGUMENT

Rent-A-Center's argument is premised on a single, demonstrably false, proposition: that the Federal Arbitration Act ("FAA") always requires that arbitration clauses be enforced according to their terms. FAA Section 2 explicitly provides, however, that arbitration clauses shall be enforced as written "save upon such grounds as exist at law or in equity for the revocation of any contract." Rent-A-Center's sweeping statement is at odds with the plain text of the statute.

According to Rent-A-Center, FAA Section 2 requires a court to enforce an arbitration award even if Section 2's own criteria for enforceability and validity are not met, as long as there is a written arbitration provision stating that any disputes relating to the enforceability of the provision are to be resolved by the arbitrator. Thus, a court faced with such a clause has no choice but to grant a motion to compel arbitration under FAA Section 4 without considering the clause's validity. Rent-A-Center's mantra is that arbitration clauses must be enforced "as written," without qualification, and that courts have no role to play, before enforcing arbitration clauses, in

drawing outer boundaries of unfairness beyond which arbitration clauses may not go.

As properly understood, consistently with this Court's precedents, the FAA requires enforcement only of arbitration agreements that are valid under state law applicable to all contracts, and it does so by setting up a specific statutory scheme with detailed rules and enforcement provisions. 9 U.S.C. §§ 2, 4. This Court has rejected the proposition that there are no limits to what parties can agree to under the FAA. Instead, the Court has emphatically held that parties cannot contract out of the important protections embedded in the text of the FAA, and that courts will not enforce provisions of arbitration agreements that are "at odds" with the "textual features" of the FAA. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Rent-A-Center seeks to upend this longstanding system by advocating an approach that would – if adopted – prevent the courts from fulfilling their fundamental, statutorily required and time-honored role of determining that arbitration clauses meet the requirements of Section 2 of the Act *before* enforcing them. Under this new approach, the drafter of an arbitration agreement could – as Rent-A-Center is attempting to do here – evade having a court determine if an arbitration clause is valid and enforceable before enforcing it simply by inserting a provision stating that challenges to the clause's validity are to be decided by the arbitrator, not the court ("a delegation clause"). Under Rent-A-Center's theory, the sole

criteria for judging the validity of such a clause would be its language; such a clause must be enforced, under this approach, even if it were signed under duress – presumably even at gunpoint – so long as the language of the delegation clause is "clear and unmistakable."

This approach not only does violence to the FAA but also runs afoul of this Court's repeated teachings that determinations of the validity and enforceability of an arbitration clause (as opposed to the contract as a whole) are for the *court* to decide, not the arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

The cases on which Rent-A-Center relies – *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) – merely suggest that challenges to the *scope* of validly formed arbitration agreements may, by clear and unmistakable language, be delegated to arbitrators. But this case involves a challenge to the *validity* and *enforceability* of a clause under Section 2, and both the FAA and this Court's teachings make clear that the law does *not* permit the drafter of an arbitration agreement to stop a court from deciding whether a valid arbitration agreement even exists.

Rent-A-Center's attempt to rip *AT&T* and *First Options* from their moorings has grave implications

for the ongoing credibility of the arbitration system. If Rent-A-Center were to succeed, there would be nothing to stop stronger parties to contracts across America from inserting similar language into the arbitration clauses that routinely appear in employment and consumer contracts. The result would be a wholesale elimination of courts' role in ensuring that arbitration clauses are valid and enforceable before enforcing them – a result that could not help but erode the public's faith in the legitimacy and integrity of arbitration as a fair and just alternative dispute resolution mechanism.

Finally, even if the Court were to determine that parties may contract around the FAA's requirement that a court ensure the validity of an arbitration clause before enforcing it, Rent-A-Center has failed to demonstrate that its delegation clause complies with "ordinary state-law principles" governing contract construction and that "clear and unmistakable evidence" proves the parties agreed to delegate the threshold question of the arbitration clause's validity to the arbitrator. *First Options*, 514 U.S. at 944.

ARGUMENT

I. STRIPPING COURTS OF THEIR ROLE IN DETERMINING WHETHER A VALID AGREEMENT TO ARBITRATE EXISTS BEFORE ENFORCING THE AGREEMENT WOULD VIOLATE THE FAA.

A. Section 2 of the FAA Bars a Court from Enforcing an Arbitration Clause Without First Determining that the Terms and Requirements of Section 2 Itself Are Met.

This case turns on a fundamental principle of federal arbitration law: a court must determine that an arbitration clause is "valid" and "enforceable" before it can enforce that clause. 9 U.S.C. § 2. Under Section 2 of the FAA, an arbitration clause is "valid" and "enforceable" "save upon such grounds as exist at law or equity for the revocation of any contract." Therefore, as the court below correctly held, a challenge to the enforceability of an arbitration clause under FAA Section 2, including an argument that the clause is unconscionable, must be decided by the court. That holding was compelled by this Court's repeated instructions that courts, not arbitrators, must decide challenges to the validity of an arbitration clause.

FAA Section 2 is the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983). It provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 2. Section 2 does not make arbitration clauses automatically valid and enforceable. Rather, it sets out three basic requirements that an arbitration clause must satisfy if it is to be enforced. First, there must be a written agreement. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds. Under this third prong of Section 2, a "generally applicable contract defense[], such as . . . unconscionability" may render an arbitration clause unenforceable. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The lower court's conclusion that the FAA requires a court to decide whether an arbitration agreement satisfies the statute before the agreement is enforced is fully in keeping with – and, indeed, compelled by – the language of Section 2.

Rent-A-Center argues, however, that its delegation clause permits it to opt out of Section 2's requirements. Under Rent-A-Center's theory, so long as

the language of a delegation clause is "clear and unmistakable," a court faced with a motion to compel arbitration need not – indeed, may not – look any further. *See* Pet. Br. 14.

That approach would violate Section 2's mandate that arbitration clauses are enforceable only when they are not subject to "such grounds as exist at law or equity for the revocation of any contract," because for a court to send to an arbitrator a challenge to the validity of the arbitration agreement is to *enforce* the arbitration clause *before its validity has been decided.* Rent-A-Center's theory puts the cart before the horse.

This is not merely an academic objection. Consider, for example, an arbitration agreement that requires one party to pay prohibitively large fees, travel extraordinary distances, or submit her claim to an arbitrator with close ties to the other party. Under Rent-A-Center's theory, if such a clause were also to contain a delegation clause, then any questions as to the validity and enforceability of that clause would have to be decided by the arbitrator, not the court. But this would present an insurmountable Catch-22, for to pursue such a challenge in arbitration a party would have to subject itself to the aspects of the clause that it is arguing are unconscionable in the first place. Under this system, any party who seeks to challenge an arbitration clause will, in effect, have lost before she has begun.

Taken to its logical conclusion, Rent-A-Center's argument would require courts to enforce even

blatantly forged arbitration clauses, so long as the language of the writing stated that the arbitrator was to decide whether a valid agreement had been formed.[1] Even Rent-A-Center's *amici* admit that such a result would be unacceptable and that a court must decide if an agreement exists before sending the dispute to arbitration. *See Amicus* Br. of Chamber of Commerce 12. The Chamber fails, however, to offer any principled reason why one of Section 2's three requirements must be decided by a court, but the others need not be. This omission is not surprising, for there is no conceivable basis for such a curious result.

Rent-A-Center's argument also logically would require a court faced with an arbitration agreement containing a delegation clause to enforce it without first determining whether the dispute involves interstate commerce. Such a delegation would be inconsistent with the practice of this Court and other courts, which have consistently determined whether interstate commerce was present in cases involving

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[1] This issue arises surprisingly often. *E.g.*, *Walter Indus., Inc. v. McMillan*, 804 So.2d 1081, 1086 (Ala. 2001) (home builder's motion to compel arbitration denied where court found that builder had forged homeowners' signatures on its arbitration clause); *Johnson v Countrywide Home Loans, Inc.*, No 1:02-CV-311, 2003 WL 21920926, at *3 (E.D. Tenn. July 9, 2003) (in light of a consumer's allegations that signature on the arbitration clause was forged, consumer could not be compelled to submit to arbitration before a trial on the issue of the forgery occurred); *Dougherty v. Mieczkowski*, 661 F. Supp. 267, 275 (D. Del. 1987) (same).

challenges to arbitration clauses. *E.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (per curiam) (determining, prior to any arbitration, that Section 2's requirement of a "contract evidencing a transaction involving commerce" was met); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (stating that the FAA applies only to "two kinds of contracts . . . , namely those in admiralty or evidencing transactions in 'commerce.' Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract").

It is clear from the foregoing that a court must determine that the first two requirements of Section 2 – the existence of a genuine written agreement to arbitrate and the presence of interstate commerce – are met before it can enforce an arbitration clause. It follows that the Section's final requirement – that agreements are only enforceable "save upon such grounds as exist at law or equity for the revocation of any contract" – must also be determined by a court. This Court has explained that Section 2 creates an "enforceability mandate," under which "State law . . . is applicable to determine which contracts are binding under Section 2." *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009).

The Court has repeatedly reached precisely this conclusion. In its cases setting forth the so-called "separability doctrine," this Court has held that, while a challenge to a contract as a whole is for the arbitrator to determine, a challenge to an arbitration clause based on Section 2 of the FAA is for the court.

E.g., *Buckeye Check Cashing*, 546 U.S. at 445 (if a party challenges the "arbitration clause itself" then "*the federal court* may proceed to adjudicate it") (emphasis added) (citing *Prima Paint*, 388 U.S. at 403-04). The Court has echoed this conclusion in several FAA cases outside of the separability context, as well. *E.g.*, *Mitsubishi Motors*, 473 U.S. at 627 ("*courts* should remain attuned" to claims that an arbitration agreement is invalid under FAA Section 2) (emphasis added); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede *judicial* determination that the collective bargaining agreement does in fact create such a duty.") (emphasis added). Rent-A-Center's reading of Section 2, in contrast, finds no support in this Court's jurisprudence.

In short, the language of Section 2 and this Court's jurisprudence relating to it dictate that a *court* must find that all three of Section 2's requirements – an agreement, the presence of interstate commerce, and no violation of any generally applicable rule of state contract law – are established *before* enforcing an agreement to arbitrate.[2]

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[2] The lower court decisions embraced by Rent-A-Center, including *Awuah v. Coverall N.A., Inc.*, 554 F.3d 7 (1st Cir. 2009), fundamentally misinterpret FAA Section 2. In *Awuah*, without citing Section 2 at all, the First Circuit found that a clause delegating to an arbitrator the decision of "whether the arbitration clause is valid" could be enforceable under most

(Continued on following page)

B. Section 4 of the FAA Requires that Courts Evaluate Challenges to an Arbitration Clause as Invalid Under Section 2 Before Enforcing the Clause.

This reading of Section 2 is also supported by Section 4, which states that a party may petition a court for an order directing arbitration to proceed, and that, "if the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

As this Court has observed, Section 4 is a procedural "device[] for enforcing an arbitration agreement." *Moses H. Cone*, 460 U.S. at 22. Although Section 4 itself is silent as to the standards by which a court must determine whether an arbitration clause is enforceable, the substantive content for the provision is provided by Section 2, which, as explained above, provides that an arbitration agreement may only be enforced if it does not run afoul of "such grounds as exist at law or equity for the revocation of any

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circumstances despite a party's unconscionability challenge to that clause's validity. *Id.* at 10. But Section 2's mandate creates a bright line rule: a court must determine whether the arbitration clause is valid under Section 2 *before* enforcing the agreement to arbitrate and *before* sending the parties to an arbitrator. Nevertheless, even in *Awuah*, the court imposed some limits on Rent-A-Center's absolute rule that parties may delegate any issue to an arbitrator. 554 F.3d at 12 (declining to enforce a delegation clause where "arbitration in this case may itself be an illusory remedy").

contract." 9 U.S.C. § 2. As this Court has explained, the procedural provisions of the FAA, Sections 4 and 3, allow litigants to "invoke arbitration agreements made enforceable by section 2." *Carlisle*, 129 S. Ct. at 1901. Thus, properly understood, Section 4 permits parties to challenge in court, before proceeding to arbitration, the validity of an arbitration clause on any ground set forth in Section 2.[3]

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[3] The courts of appeal have consistently applied this rule. *E.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir 2003) ("A party to a *valid and enforceable* arbitration agreement is entitled to . . . an order compelling . . . arbitration. *See, e.g.*, 9 U.S.C. §§ 3-4.") (emphasis added); *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486 (5th Cir. 2002) (Section 4 "provides for a court's role in the arbitral process prior to issuance of an award in the event of a claimed 'default' of that process pursuant to a *valid* agreement.") (emphasis added); *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) ("[W]hen asked by a party to compel arbitration under a contract, . . . [i]f the *validity* of the agreement to arbitrate is 'in issue,' the court must proceed to a trial to resolve the question. 9 U.S.C. § 4.") (emphasis added) (internal quotations omitted); *Glass v. Kidder Peabody & Co., Inc* , 114 F.3d 446, 451 (4th Cir. 1997) ("Sections 2, 3 and 4 of that Act are the key statutory provisions governing the substantive and procedural law associated with arbitration cases and the enforceability of arbitration agreements found *valid* by the district court.") (emphasis added); *Matterhorn, Inc. v NCR Corp.*, 763 F.2d 866, 868 (7th Cir. 1985) ("[A]lthough section 4 . . . speaks only of challenges to 'the making' of the agreement to arbitrate, the term has been held to encompass any challenge to the *validity* of the agreement.") (emphasis added); *cf. Conrad v. Phone Directories Co , Inc.*, 585 F.3d 1376, 1380 (10th Cir. 2009) (Section 4 "authorize[s] district courts to compel arbitration under a *valid* agreement to arbitrate") (emphasis added).

Rent-A-Center's argument to the contrary does not withstand scrutiny. Rent-A-Center argues that Section 4 does not apply here because an unconscionability defense does not implicate the "making" of a contract. Pet. Br. 25-26 n.9. That argument defeats itself, because if Rent-A-Center were correct that Section 4 only allows courts to hear issues about the "making of an agreement" as narrowly defined, then it would follow that an unconscionability challenge could *never* be considered by a court even *absent* a delegation clause. This reading of the statute cannot be reconciled with this Court's well-established teachings that arbitration clauses may be challenged as unconscionable under applicable state law. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 687. The only plausible way to read Section 4 is as having a scope that is co-extensive with Section 2.

Rent-A-Center's narrow interpretation of the language of Section 4 also finds no support in contract law. When the FAA was passed, in 1925, the generally applicable contract defenses incorporated into Section 2 of the FAA (fraud, duress, or unconscionability) were understood to be defenses precisely to the "making" of a contract. *E.g.*, *Hume v. United States*, 132 U.S. 406, 415 (1889) (defining unconscionable agreement as that "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"); *Paris v. Smith*, 270 F. 65, 67 (2d Cir. 1920) (fraud renders a contract unenforceable where "one of the parties fails to act in good faith, and in fact

deceives the other" such that there is no "meeting of the minds"); *Diescher v. Comm'r of Internal Revenue*, 18 B.T.A. 353, 358 (1929) ("[C]ontracts made [under duress] are void because there has been no voluntary meeting of the minds."). Thus, Section 4 itself does not, as Rent-A-Center suggests, limit challenges to defenses that, involve the execution of the contract. Pet. Br. 26 n.9. Instead, the FAA's drafters chose language that encompassed all of Section 2's state-law defenses, including unconscionability.

Rent-A-Center's crabbed reading of Section 4 also ignores this Court's jurisprudence. This Court has held that an argument that an arbitration clause is invalid under Section 2 because it is subject to a generally applicable contract defense constitutes a challenge to "the making of the arbitration agreement" within the meaning of Section 4 and thus is for a court to resolve. In *Prima Paint*, the Court held that, when a state contract law defense is interposed against an arbitration clause itself (as opposed to when such a defense is raised against the underlying contract), Section 4 of the FAA requires that *a court* – not an arbitrator – must resolve that defense:

> Under section 4, . . . the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – *an issue which goes to the 'making' of the agreement to arbitrate* – the federal court

> may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

388 U.S. at 403-04 (emphasis added); *see also Buckeye Check Cashing*, 546 U.S. at 445. The italicized language makes clear that where a litigant contends that the parties did not make an enforceable arbitration clause itself, because of fraud in the inducement, that challenge requires a court – not an arbitrator – to resolve.

That this case involves an unconscionability challenge to an arbitration agreement, rather than a challenge based on fraud in the inducement (as in *Prima Paint*), is a distinction without a difference. A finding that a so-called "agreement" was procured by fraud in the inducement renders it voidable, *see Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 94 (1987), which means that "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract." Restatement (Second) of Contracts § 7 (1981); *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) ("contracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party"). In *Prima Paint*, this Court held that this sort of defense – i.e., one that merely renders a contract "voidable," rather than "void" – goes to the "making" of the arbitration agreement and therefore, under Section 4, is for a court to decide.

Because unconscionability similarly renders a contract "voidable," there is no reason to treat these defenses differently. In each case, under standard contract law principles, a contract has come into existence, but the aggrieved party has a defense to its enforcement based on standard principles of contract law. In the language of Section 2, one party is seeking to enforce an arbitration clause and the other contends the agreement is invalid and unenforceable. *E.g.*, *King v. Fox*, 458 F.3d 39, 40 (2d Cir. 2006) (unconscionable provision rendered agreement voidable); *Worldwide Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 195 (3d Cir. 1992) (under Pennsylvania law, "contracts are voidable if their enforcement would produce an unconscionable result"); *White v. Gen. Motors Corp., Inc.*, 908 F.2d 669, 673-74 (10th Cir. 1990) ("fraud, ambiguity, duress, or unconscionability" are grounds to hold a contract voidable). Nevada law adheres to this hornbook rule. *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 118 (Nev. 1992) ("unconscionable contract provisions are voidable").

Because unconscionability is precisely the same type of defense to a contract as fraud in the inducement – both render an arbitration agreement, or any other contract term, voidable – both defenses are governed by *Prima Paint*'s holding that such defenses go to the "'making' of the agreement to arbitrate" and are therefore for a court to decide under Section 4 of the FAA. *E.g.*, *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998) (claims that arbitration clause "lacks mutuality of obligation, *is*

unconscionable, and violates public policy," go "to the 'making' of the agreement to arbitrate," and are thus to be decided by a court) (citing *Prima Paint*) (emphasis added).

This conclusion is bolstered by the legislative history of the FAA, which makes clear that Section 4 of the Act was intended to ensure that courts would decide whether an arbitration clause is valid under generally applicable contract law. Evidence of this legislative intent comes from Julius Henry Cohen, "one of the primary drafters of" the FAA. *Hall Street*, 552 U.S. at 589 n.7. Shortly after the FAA was passed, Cohen co-authored an article with Kenneth Drayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926), which has been recognized as illuminating the Act's legislative history. *E.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 288 n.1 (1995) (Thomas, J., dissenting). In this article, Cohen and Drayton stated that Congress intended *courts* to pass on challenges to the validity of arbitration clauses:

> At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.

12 VA. L. REV. at 267-68, 271. *See also A Bill Relating Sales and Contracts to Sell in Interstate and Foreign*

Commerce and a Bill to Make Valid and Enforceable Written Provisions on Agreements for Arbitration of Disputes; Hearing on S. 4213 and 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 5 (1923) (Statement of Sen. Walsh) ("[T]he court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law, and consequently, the court is obliged, it seems to me you are obliged, to go to court.").

In short, both the language and history of Section 4 make plain that Congress intended the enforceability of arbitration clauses under the Act to be *determined* by the courts, not merely assumed without any consideration.

C. The Court Has Not Created an Exception Permitting Parties to Contract Out of the FAA's Requirement that a Court Determine the Validity of an Arbitration Clause Before Enforcing It.

Rent-A-Center argues that it can simply opt out of both Sections 2 and 4 by use of a delegation clause. Rent-A-Center's sole basis for its argument comes from two snippets of language from this Court's decisions in *AT&T*, 475 U.S. 643, and *First Options*, 514 U.S. 938. *E.g.*, Pet. Br. 12. A closer look at the facts underlying those cases and the premises of the long line of "arbitrability" cases before and after

them, however, reveals that they did not alter the fundamental principle that a court must decide whether an arbitration clause is valid and enforceable before enforcing it.[4] Rather, *AT&T* and *First Options* merely stated a rule that, while courts normally must decide gateway questions of the scope of a valid and enforceable arbitration clause, there is a narrow exception: parties may, under certain circumstances, assign that question to an arbitrator.

Crucially, neither *AT&T* nor *First Options* held that this exception would apply to a challenge to the validity or enforceability of an arbitration agreement under Section 2 of the FAA. In *AT&T*, the Court faced the question whether a court or an arbitrator should

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[4] A number of scholars have noted that the term "arbitrability" has generated confusion in part because it lumps together distinct questions of, on the one hand, the validity and/or existence of arbitration clauses and, on the other, the scope of concededly valid arbitration agreements. *E.g.*, Robert H. Smit, *Separability and Competence-Competence in International Arbitration:* Ex Nihilo Nihil Fit*? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 28 n 25 (2002) ("The *First Options* Court confusingly used the term 'arbitrability' to include . . . the question of what particular dispute the clause covers. . . . The term 'arbitrability' is also generally used to address the question of whether, under applicable law, a dispute is susceptible of arbitration at all – *i.e.*, the validity or enforceability of the arbitration agreement as applied to a particular dispute."). Accordingly, this brief will avoid that term and instead distinguish between disputes as to whether the requirements of Section 2 have been met, on the one hand, and disputes as to whether a given claim falls within the scope of a valid agreement to arbitrate, on the other.

determine whether the arbitration clause in a collective bargaining agreement covered a particular grievance claim arising from AT&T's decision to lay off workers. 475 U.S. at 644. AT&T argued that its layoff decision was within its exclusive discretion and that it was not required to submit the propriety of that decision to arbitration. *Id.* at 645-46. The Court held that, as a general rule, "the question of arbitrability – whether a [contract] creates a duty for the parties to arbitrate *the particular grievance* – is undeniably an issue for judicial determination." *Id.* at 649 (emphasis added). However, the Court explained, that general rule only applies "[u]nless the parties clearly and unmistakably provide otherwise." *Id.* The question whether a "particular grievance" is arbitrable is a question of scope. *See United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 n.7 (1960). Indeed, there was no dispute in *AT&T* as to the validity or enforceability of the arbitration agreement at issue. *See id.* at 646-47. Thus, *AT&T* did not, as Rent-A-Center urges, leap into entirely new territory and create a sweeping exception from Section 2's explicit command. Nothing in this Court's cases authorizes parties to impose contractually invalid arbitration clauses but write them in such a way as to block courts from fulfilling their duty under the FAA.

The same is true of *First Options*. In *First Options*, the Court addressed whether the Kaplans, who had entered into an arbitration agreement with First Options on behalf of their company, MK1, had given an arbitrator authority to decide whether

claims against them personally were subject to arbitration. 415 U.S. at 941. Arbitration had already taken place; over the Kaplans' objections, the arbitrator had decided that he did have that authority. The question for the Court was whether the district court should have reviewed the arbitrator's award independently or deferentially, and the answer turned on whether the Court found the Kaplans had clearly and unmistakably agreed to let the arbitrator determine whether claims against them were arbitrable. *Id.* at 942. The Court held that, because the Kaplans had not so agreed, the lower court was correct in reviewing the arbitrator's decision independently.

The *First Options* Court noted in dicta that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so," *id.* at 944, but that language does not imply that parties could lawfully delegate to the arbitrator questions of whether an arbitration clause is *valid* under Section 2 of the FAA. As a threshold matter, the Court explained that a court must ascertain whether the agreement to arbitrate complied with "ordinary state-law principles that govern the formation of contracts." *Id.* Indeed, the Court in *First Options* started with the understanding that there was a valid agreement in existence between the company owned by the Kaplans and First Options – the case did not involve a challenge, under Section 2, to the enforceability of that agreement. *Id.* at 945 (explaining that clear and unmistakable evidence was important

because "[a] party often might not focus on . . . the significance of having arbitrators decide the scope of their own powers") (citing Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1508-09 (1959)). Moreover, the Court expressly recognized that the Kaplans could have gotten "an independent court decision on arbitrability . . . by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, *see* 9 U.S.C. § 4." 415 U.S. at 946. The Court thus acknowledged that if a challenge to the presence of a valid Section 2 agreement had been brought under Section 4, that challenge would have been for a court. *Id.*

This reading of *First Options* is supported by the Cox article cited by the Court. As Cox explained, "[a] specific stipulation giving the arbitrator power to decide all questions of arbitrability is in substance a promise to submit to arbitration all questions concerning the *meaning* of the arbitration clause." Cox, *supra*, at 1508 (emphasis added). It makes sense that parties to a valid arbitration agreement should be able to authorize the arbitrator to decide its scope because scope is at bottom a question of contract meaning or interpretation. However, "since the arbitrator's authority and legitimacy are based on the existence of a valid and enforceable agreement to arbitrate," disputes over whether a valid arbitration agreement exists "more directly call into question the arbitrator's authority than disputes over the scope of such an agreement." Karen Halverson Cross, *Letting*

the Arbitrator Decide? Unconscionability and the Allocation of Authority Between Courts and Arbitrators 24 (Feb. 14, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552966; *see also Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 488, 491 (1972) ("nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration").

This Court's own later statements confirm that the language that Rent-A-Center relies on from *First Options* merely relates to the scope of arbitration clauses. In *Carlisle*, 129 S. Ct. at 1902-03, for example, this Court interpreted the statement in *First Options* that "arbitration . . . is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration" as "pertain[ing] only to issues parties agreed to arbitrate." In other words, this Court described *First Options* in *Carlisle* as no more than a classic dispute over the scope of an arbitration clause: what issues did the parties agree to arbitrate?

In the wake of *AT&T* and *First Options*, the Court has never applied the "clear and unmistakable" exception to hold that the drafter of an arbitration clause can delegate the validity and enforceability of the clause under FAA Section 2 to the arbitrator. On the contrary, even in a case where the language of the arbitration clause clearly provided that all questions of the enforceability of the clause were to be decided by the arbitrator, the Court itself addressed and

decided a challenge to the validity of the arbitration agreement. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 83 n.1 (2000) (deciding the validity of an arbitration clause despite clear language delegating "[a]ll disputes . . . relating to . . . the validity of this arbitration clause" to an arbitrator). Under Rent-A-Center's theory, the Court should never have reached that question.

Rent-A-Center and its *amici* argue that in addition to *AT&T* and *First Options*, two decisions by this Court support its claim that it can contract around FAA Section 2. Rent-A-Center and its *amicus* the Equal Employment Advisory Council ("EEAC") argue, for example, that the unconscionability decision is properly one for the arbitrator in light of this Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). *See* Pet. Br. 22; *Amicus* Br. of EEAC 12. *Bazzle* does not support Rent-A-Center here, however, as this Court specifically stated that the question there did *not* concern "the validity of the arbitration clause." 539 U.S. at 452. There was no dispute in *Bazzle* as to whether the threshold requirements of Section 2 had been met; the only question for the arbitrator was whether the (concededly enforceable) clause permitted a particular type of action.

Similarly, EEAC argues that this Court's decision in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), suggests that the validity of Rent-A-Center's arbitration clause is for the arbitrator to decide. *Amicus* Br. of EEAC 11-12 n.3. *PacifiCare* is readily

distinguishable from this case. The sophisticated physician plaintiffs in *PacifiCare* did not argue that the agreement at issue there was unconscionable or otherwise unenforceable under Section 2 of the FAA. *See* Pet. Reply Br. 1, 3, 10, *PacifiCare*, 538 U.S. 401 (No. 02-215), 2003 WL 359257. *PacifiCare* involved an arbitration clause whose language and effect were ambiguous as to whether a particular form of relief would be available in arbitration. *See PacifiCare*, 438 U.S. at 405. This Court held that it could not determine that the agreement was unenforceable on that basis when the arbitrators might well interpret it to provide for the disputed form of relief. The Court did not suggest that the arbitrators were empowered to decide whether the arbitration agreement itself was enforceable, but only that they should decide in the first instance what relief was available under its ambiguous terms. Thus, *PacifiCare* was much more akin to the scope cases discussed above than the present case.

In short, where there is no dispute that a valid and enforceable agreement to arbitrate exists, the Court has stated that, if they do so clearly and unmistakably, parties may agree that the arbitrator may decide issues related to the scope of that agreement. But here, the existence of a valid and enforceable agreement to arbitrate *is* disputed. The language of Section 2, this Court's jurisprudence relating to the FAA, and other persuasive authority all dictate that, where challenged, all three of Section 2's requirements – an agreement, the presence of

interstate commerce, and no violation of any generally applicable rule of state law – must be found by a court *before* it enforces an arbitration clause.

D. A Comparison with the Law Governing Forum Selection Clauses Establishes that Stripping Courts of Their Role in Determining Threshold Challenges to the Validity of Arbitration Clauses Would Result in Treating Arbitration Clauses Differently Than Analogous Contractual Provisions.

Rent-A-Center's theory also fails because it seeks to have this Court treat arbitration agreements differently than the most closely analogous type of contractual provisions: forum-selection clauses. Adopting Rent-A-Center's approach would thus violate this Court's teaching that arbitration provisions must be placed on "equal footing with all other contracts." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

This Court has stated that an agreement to arbitrate is "in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). As such, agreements to arbitrate, like the one at issue in this case, are subject to the same contract-validity rules that govern the enforcement of forum selection clauses. *See id.* at 519 n.14.

This Court has held that, when faced with a disputed motion to enforce a forum-selection clause, a

non-forum court *must* determine the validity and enforceability of the clause before sending the parties to the specified forum. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (non-forum courts faced with a motion to compel a forum-selection clause are to "enforce the forum clause specifically *unless* [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching") (emphasis added). Under Rent-A-Center's logic, the non-forum court should enforce the clause first and have the forum court determine whether the clause constitutes "overreaching."

This Court's rule for forum-selection clauses (which is the same rule that applies under Respondent's reading of the FAA) is designed to ensure that only legally valid and enforceable forum-selection clauses are enforced and to prevent one party from gaining access to a forum through impermissible means. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) ("It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental unfairness."). As a result, no court is free to disregard this threshold inquiry, even where the forum-selection clause is "clearly mandatory and all-encompassing." *Bremen*, 407 U.S. at 20.[5]

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[5] Rent-A-Center's *amici* acknowledge this rule, yet they ignore how it underscores the extreme nature of Rent-A-Center's

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The sanctity of this rule in the forum-selection context is beyond dispute, and lower courts have uniformly applied it. *E.g.*, *Rivera v. Centro Medical de Turabo, Inc.*, 575 F.3d 10, 18 (1st Cir. 2009) ("[A] forum selection clause should be enforced unless the resisting party can show 'that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching . . . or that enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute of judicial decision.'") (quoting *Bremen*, 407 U.S. at 15) (brackets omitted); *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 243 (5th Cir. 2009); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295-96 (11th Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (*en banc*); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993).

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position, which requires "unobstructed enforcement" of an arbitration agreement. *See Amicus* Br. of Pacific Legal Foundation 6 (calling the rule in *Bremen* "the generally sanctioned approach"). Even according to *amici*, a party challenging a motion to enforce a forum-selection clause is entitled to challenge that clause's enforceability in the non-forum court, and a non-forum court is entitled to decide whether the clause must be enforced. *See Amicus* Br. of Chamber of Commerce 26 ("[T]his Court's forum-selection decisions show [that] a party challenging such an agreement as unconscionable or unreasonable must satisfy a demanding test."). The Chamber says that "an arbitration clause should not be refused enforcement merely for perceived, general unfairness," *id.* at 27, but that is not what is at stake in this case, which is whether a court may decide gateway question of enforceability *at all*.

Under this well-settled rule, courts are required to address precisely the threshold questions that Rent-A-Center seeks here to consign to arbitrators. *See* Restatement (Second) of Conflict of Laws § 80 (1988) ("The parties' agreement as to the place of action . . . will be given effect unless it is unfair or unreasonable."). According to the Restatement, a court may decline to enforce a forum-selection clause if, among other reasons, "it finds that the provision was obtained by fraud, duress, the abuse of economic power or other unconscionable means." *Id.* cmt. c.

In this case, Rent-A-Center is asking this Court to erect a different set of rules for arbitration agreements. Under Rent-A-Center's proposal, a non-forum court has *no* authority to decide threshold questions regarding the arbitration agreement's validity or enforceability, and instead must *automatically* send the parties to arbitration – an approach at odds with the "correct approach" that guides enforcement of forum-selection clauses in traditional contracts. *Bremen*, 407 U.S. at 15. Arbitration agreements are "as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12. To allow an arbitration clause to assume self-enforcing status that requires a court to automatically enforce the agreement with no inquiry into its fundamental fairness, would impermissibly elevate it over other contracts.[6]

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[6] Although this Court has never expressly decided the effect of a forum-selection clause that contains a delegation clause like

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II. PERMITTING PARTIES TO STRIP COURTS OF THEIR STATUTORY ROLE OF ENSURING ARBITRATION AGREEMENTS ARE VALID BEFORE ENFORCING THEM WOULD GUT FAA SECTION 2 AND ENDANGER THE LEGITIMACY OF ARBITRATION.

FAA Section 2, which provides that arbitration clauses are only as enforceable as other contract terms, is crucial not only to protecting the enforceability of fair arbitration agreements, but also to preserving the rights of weaker parties to contracts. By empowering courts to "invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract,'" Section 2 guards against the risk of abuse that accompanies unequal bargaining power. *Allied-Bruce*, 513 U.S. at 281. For example, corporations may insist on mandatory arbitration in consumer contracts only because Section 2 "gives States a method for protecting consumers against unfair pressure to agree to a contract

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the one at-issue here, it is illogical to believe that such a provision in a standard form contract could successfully defeat the rule this Court erected in *Bremen* and prevent a party from challenging the enforceability of a forum-selection clause in a non-forum court. To allow a party to achieve this result simply by fiat undermines the *raison d'etre* of the rule, which is to ensure that only those forum-selection clauses that are fair and reasonable are enforced. A party cannot avoid this requirement simply by inserting bootstrapping language into the clause. This same reasoning applies here.

with an unwanted arbitration provision."[7] *Id.* Rent-A-Center's proposed new rule would seriously limit that protection and thereby erode public faith in arbitration as a legitimate alternative to court.

Furthermore, because judicial review of arbitration awards is extremely narrow, if Rent-A-Center's rule becomes law, an arbitrator's decision that an arbitration clause is not unconscionable will be essentially unreviewable. While arbitrators are indisputably competent to decide issues of state law and contract validity in general, no decisionmaker should have ultimate power to judge itself.

A. Court Decisions Striking Down Unconscionable Arbitration Clauses Guard Against the Misuse of Arbitration and Promote Enforcement of Fair Arbitration Clauses.

The Court's promise in *Allied-Bruce* that FAA Section 2 would guard against abuse has been largely realized by lower courts' refusal to enforce arbitration

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[7] This Court has recognized the importance of the FAA's protection against abuse of arbitration clauses by powerful parties in a series of cases dating back decades. *See Shearson/Am. Express, Inc v. McMahon*, 482 U.S. 220, 226 (1987) (arbitration agreements should be enforced "[a]bsent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract"); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S 20, 33 (1991) (same); *Mitsubishi Motors*, 473 U.S. at 627 (same).

clauses that are invalid under state law. Arbitration agreements, now widespread in employment and consumer settings, are routinely enforced by courts either without controversy or, sometimes, over challenges. Crucially, however, in an important minority of cases federal and state courts throughout the United States have struck down extreme abuses of the arbitration process.

For example, courts have struck down contract terms that imposed prohibitive costs of arbitration upon individuals.[8] Similarly, courts have struck down

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[8] *E.g.*, *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 778 (N.D. Ill. 2002) (holding unenforceable an arbitration fee provision that would have required consumer to pay "staggering" costs, from $48,000 to $126,000, to have claim against restaurant chain arbitrated); *Phillips v. Assocs. Home Equity Servs.*, 179 F Supp 2d 840, 846-47 (N.D Ill. 2001) (refusing to enforce arbitration clause where consumer would have been required to pay a $4,000 filing fee, as well as half of the arbitrator's fees, travel expenses, hearing room rental, and costs, to arbitrate her Truth in Lending Act claim, which was "likely to be at least twelve times what it currently costs to file a case in federal court"); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 896-97 (W.D Va 2001) (invalidating arbitration clause when fees and costs amounted to an "insurmountable barrier" to consumer vindicating statutory rights; consumer would have had to pay $2,000 filing fee, plus costs ranging from $600-4100 per day); *Jones v. Fujitso Network Commc'ns., Inc.*, 81 F Supp 2d 688, 693 (N.D. Tex 1999) (refusing to enforce term that would have required employee fired for requesting medical leave to pay up to $7,000 to pursue his claim in arbitration because it would "substantially limit[ ] the use of the arbitral forum"); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003) (refusing to enforce clause that would have required insured to pay $2,500 to arbitrate claim for under

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as unconscionable clauses that gave one party exclusive power to select the particular arbitrator for any disputes.[9] Contrary to Rent-A-Center's claims, these courts have not invalidated arbitration clauses out of any "hostility to arbitration" or on the theory that arbitration itself is unconscionable *per se*. Pet. Br. 13. Rather, successful unconscionability challenges involve terms that are not inherent to arbitration, but have involved either clauses that warp the arbitration process (such as those allowing one party sole power to select the arbitrator) or other terms that have been tacked on to arbitration clauses by parties seeking some sort of other advantage, such as terms shortening limitations periods or stripping individuals of rights that they would have under

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$10,000 arising from denial of payment for multiple sclerosis treatment); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571, 574 (N.Y App Div. 1998) (striking term requiring consumer to pay advance non-refundable $4,000 arbitration fee, where fee exceeded value of most Gateway products and would "surely serve[ ] to deter the individual consumer" from pursuing his claim); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct App. 2002) (invalidating clause that would have required "desperate[ly]" poor purchaser of used mobile home to pay over $2,000 in arbitration fees to arbitrate $1,500 claim).

[9] *E.g.*, *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004); *Murray v. United Food & Commercial Workers Union*, 289 F.3d 297, 303 (4th Cir 2002); *Harold Allen's Mobile Home Factory Outlet v. Butler*, 825 So.2d 779, 785 (Ala. 2002); *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Ct. App. 1993).

federal and state civil rights and consumer laws.[10] Indeed, in many cases of this latter sort, courts strike down only the abusive term and enforce the remainder of the arbitration clause. For example, in *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85-86 (D.C. Cir. 2005), the court, in an opinion by then-Judge Roberts, struck down a term barring an employee from recovering punitive damages available under a statute. The court then severed that term and enforced the remainder of the arbitration clause. *Id.*[11] Faithfully applying FAA Section 2, these decisions enforce this Court's mandate that arbitration must allow parties to "effectively vindicate" their rights. *Mitsubishi*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 28. Far from being "paternalistic" or hostile to

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[10] *E g., Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (ban on punitive and exemplary damages unenforceable in Title VII case); *Alexander*, 341 F.3d at 266 (in civil rights case, refusing to enforce term shortening limitations period to only 30 days as "clearly unreasonable and unduly favorable to" the employer); *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. Dist. Ct. App. 2007) (refusing to enforce arbitration clause capping noneconomic damages and waiving punitive damages permitted by state Assisted Living Facilities Act); *In re Poly-America, L.P.*, 262 S.W.3d 337, 359-60 (Tex. 2008) (invalidating provision stripping consumer of statutory right to attorneys' fees if he prevailed).

[11] *See also Hadnot*, 344 F.3d at 478; *Great Earth Cos.*, 288 F.3d at 890-91 (severing provision requiring arbitration in distant forum but enforcing rest of clause); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (striking provision that barred recovery of punitive damages but enforcing rest of clause); *Alterra, supra*, n.10; *In re Poly-America, supra*, n.10.

arbitration, Chamber Br. 14, such decisions promote arbitration as a fair institution.

Not only have judicial unconscionability decisions led to fairer arbitration provisions, they have also enhanced the integrity of the arbitration process. That was the conclusion of the drafters of the Revised Uniform Arbitration Act ("RUAA"), which "incorporate[s] the holdings of the vast majority of state courts and the law that has developed under the [FAA]." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).[12] One comment relating to "[c]ontracts of adhesion and unconscionability" addresses situations of "[u]nequal bargaining power" in the employer/employee relationship. The RUAA comment directly addresses the central issue of this case:

> Because an arbitration agreement effectively waives a party's right to a jury trial, *courts*

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[12] In *Howsam*, this Court looked to the RUAA for persuasive authority in interpreting the FAA. Based on the RUAA, the Court determined that questions of "procedural arbitrability" are generally questions for the arbitrator. *Howsam*, 537 U.S. at 85. The RUAA, which was prepared by a blue-ribbon panel of arbitrators, commercial attorneys, and scholars interested in alternative dispute resolution, has been widely celebrated as "a worthy, and overdue, effort to modernize our arbitration laws." Samuel Estreicher & Kenneth J. Turnbull, *Revised Uniform Arbitration Act Approved*, N.Y.L.J., Nov. 2, 2000, at 3. It was endorsed by numerous arbitration providers, including the American Arbitration Association, JAMS, and the National Academy of Arbitrators as well as the ABA. Francis J. Pavetti, *Why States Should Enact the Revised Uniform Arbitration Act*, 3 PEPP. DISP. RESOL. L.J. 443, 444 n.2 (2003).

> should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights that provide claimants with important remedies. *Courts* should determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.

RUAA § 6, cmt. 7, 7 U.L.A. 28 (2000) (emphasis added).

Such judicial involvement in the process, as one major corporation recently acknowledged in this Court, has encouraged corporations to rewrite their arbitration clauses to comply with generally applicable law:

> At first, many [mandatory arbitration] provisions [in consumer contracts] plainly favored the businesses that drafted them. Invoking state unconscionability principles, several courts struck down these clauses, concluding that they impeded customers' ability to receive full redress for their claims. In response, businesses committed to the use of arbitration, including ATTM, jettisoned this first generation of arbitration provisions and developed a second generation, which eliminated most of the features that courts had singled out for criticism.

Amicus Br. of AT&T Mobility, L.L.C. 4, *T-Mobile USA, Inc. v. Laster*, No. 07-976 (Feb. 25, 2008).

Recent testimony from pro-arbitration witnesses, provided during Congressional debate over the Arbitration Fairness Act ("AFA"), also explains how judicial resolution of unconscionability challenges helps preserve the legitimacy of arbitration.[13] Professor Stephen J. Ware of the University of Kansas School of Law, for example, testified that

> we currently have a very sensible system in which courts determine, case-by-case, which arbitration agreements should not be enforced and which provide for a fair process and so should be enforced. . . . Congress should continue to rely on the courts, as guided by the [FAA], to police the neutrality of arbitration in the United States.

Mandatory Binding Arbitration: Is it Fair and Voluntary? Hearing Before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary, 111th Cong. 85, 181 (2009) (statement of Prof. Stephen J. Ware); *see also, Mandatory Binding Arbitration Agreements: Are They Fair for Consumers? Hearing Before the Subcomm. on Commercial an Administrative Law of the Comm. on the Judiciary*, 110th Cong. 44 (2007) (statement of Mark J. Levin, Esq., Ballard Spahr Andrews & Ingersoll, LLP) ("[C]ourts very rigorously scrutinize arbitration agreements to

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[13] The AFA, currently pending before both houses of Congress, S. 931, 111th Cong. (2009); H.R. 1020, 111th Cong. (2009), would amend the FAA to ban pre-dispute arbitration clauses in all consumer and employment contracts.

make sure that they are fair, and they are quite vigilant in refusing to enforce those relatively few agreements that they conclude do not pass muster under applicable state and federal laws.").

In sum, although many arbitration clauses serve the interests of mutually consenting parties, arbitration has, on occasion, been abused through the use of manifestly unfair terms and clauses that seek to exploit a gap in bargaining power between the parties drafting such clauses and the parties required to sign them. Judicial scrutiny of such clauses helps ensure fairness and prevent abuses that would harm the institution of arbitration.[14]

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[14] Neither the merits of Jackson's particular unconscionability challenges nor the question of whether those challenges would be preempted by the FAA are before the Court. Rent-A-Center seeks a much grander prize: the ability for it and like-minded companies to draft around the FAA's requirement that courts review the validity and enforceability of arbitration clauses before enforcing them. Rent-A-Center and its *amici* have, however, advanced some arguments against Jackson's unconscionability arguments, none of which have merit. Courts throughout the nation have held that one-sided arbitration clauses like Rent-a-Center's are unconscionable. *E.g.*, *Taylor v. Butler*, 142 S.W.3d 277, 286 n.4 (Tenn. 2004) (noting that decisions taking the same position as Jackson are "the majority view," and are "more persuasive"); *Iberia Credit Bureau, Inc v. Cingular Wireless LLC*, 379 F 3d 159, 168 (5th Cir 2004); *Batory v. Sears, Roebuck & Co.*, 456 F. Supp. 2d 1137, 1140 (D. Ariz 2006); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791 (Del. 1992); *Palm Beach Motor Cars Ltd., Inc v. Jeffries*, 885 So.2d 990, 992 (Fla. Dist. Ct App. 2004); *Greenpoint Credit L.L C. v Reynolds*, 151 S.W.3d 868, 875 (Mo. Ct. App. 2005). Equally

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B. Post-Arbitration Judicial Review Alone Will Not Adequately Protect Against Abuses.

Rent-A-Center speaks of referring the issue of contract enforceability to the arbitrator "in the first instance," Pet. Br. 12, suggesting that even if the arbitrator makes an incorrect decision, it can always be subsequently cured by judicial review of the arbitrator's decision. While the FAA does provide for limited judicial review of arbitration awards, 9 U.S.C. §§ 9-11, post-arbitration review is insufficient to ensure the legitimacy and fairness of arbitration for at least two reasons. First, it would be easy for employers to create arbitration systems that would deter employees from ever entering arbitration, much less seeking review. Second, judicial review of arbitrators' decisions is so narrow that arbitrators' decisions on the validity of arbitration clauses will never be meaningfully reviewed.

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unpersuasive is the Chamber of Commerce's argument, Br 19, that the FAA preempts state law invalidating overly one-sided terms favoring the stronger party, such as the Nevada law at issue here *E.g.*, *Wis Auto Title Loans, Inc. v. Jones*, 714 N W 2d 155, 176 (Wisc. 2006) ("Our application of state contract law to invalidate the arbitration provision at issue in the instant case is consistent with § 2 of the Federal Arbitration Act."). In any event, even if Jackson's unconscionability arguments were meritless or preempted, that would not mean that the courts should not decide those issues before compelling arbitration, which is the issue here.

1. Requiring Employees to Wait for Judicial Review of the Fairness of Arbitration Clauses Until After They Have Completed Arbitration Creates Possibilities for Severe Abuse.

Rent-A-Center's rule would permit employers and corporations to impose arbitration clauses that would deter individuals from ever going through abusive arbitration systems and would insulate those systems from all post-arbitration judicial review. As explained above, most arbitration clauses are enforceable and have been enforced, but there have been situations where agreements marked by overreaching have made it expensive, difficult, or impossible for individuals to pursue claims in arbitration. Requiring employees and consumers to navigate such systems before they could challenge their fairness would enable employers and businesses to deter nearly all claims.

For example, some arbitration clauses have required individuals to travel long distances to have their claims heard.[15] If an individual could not

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[15] Courts have routinely struck down such provisions as unconscionable *E.g.*, *Nagrampa v MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (*en banc*) (invalidating requirement that individual travel from California to Boston to arbitrate); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa 2007) (refusing to enforce requirement that Pennsylvania consumer's claim be heard in California); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App 2003) ("[T]he selection of Arkansas as the venue for arbitration is unexpected and

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challenge the unfairness of such a procedure until after arbitrating under it, few challenges would ever be heard, because few individuals – no matter how valid their claims – would be able to pursue them under such a system. Rent-A-Center's proposed rule thus would render even such flagrantly illegal provisions effectively non-reviewable.

Similarly, some arbitration clauses include "loser-pays" rules that require plaintiffs with non-frivolous claims, but who nonetheless do not ultimately prevail, to pay the defendant's attorneys' fees. A number of courts have held that such rules were unconscionable and unenforceable.[16] Delaying judicial scrutiny of unfair loser-pays rules would deter many individuals from vindicating their rights under civil rights and consumer protection laws because they could not afford to take the risk of arbitrating under such rules as a prerequisite to challenging them.

Under Rent-A-Center's approach, corporations could sidestep this judicial protection and draft clauses providing that the same arbitration firms

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unconscionably unfair."); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (striking down term requiring arbitration in distant forum because it "effectively eliminates any remedy for consumers").

[16] *E.g.*, *Alexander*, 341 F.3d at 269 (loser-pays rule, among other terms, "effectively denied [the employee] recompense for [the employer's] alleged misconduct."); *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996) (loser-pays rule was "substantively unconscionable on its face").

that impose loser-pays rules would judge the fairness of such rules. The result would be predictable: "[A]ssessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks of inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1987).

Rent-A-Center's proposed rule of law would create easy opportunities for abuse that could never be remedied. The proper way to prevent such abuses is the way that Congress created and FAA Sections 2 and 4 require – allowing courts to resolve allegations that a given arbitration clause violates generally applicable rules of state contract law *before* enforcing the clause.

2. The FAA Provides For Only Very Narrow Review of Arbitration Awards.

Post-arbitration judicial review also cannot be relied on to police arbitration abuses because of the limited nature of review permitted by the FAA. The standard of judicial review for arbitrators' decisions is "one of the narrowest standards of judicial review in all of American jurisprudence," *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005), to the point that "perhaps it ought not be called 'review' at all." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). FAA

Section 10(a) provides that an arbitrator's award may be vacated only if (1) "the award was procured by corruption, fraud or undue means"; (2) the arbitrators displayed "evident partiality or corruption"; (3) the arbitrators "were guilty of misconduct," including refusing to postpone the hearing, refusing to hear material evidence, or other misconduct prejudicing the rights of a party; or (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Only the last of these four categories – FAA Section 10(a)(4) – provides for any review at all of the substance of a decision. But even that review is meaningless here. Rent-A-Center does not suggest, nor could it, that, by ruling on an issue the parties expressly delegated to him, an arbitrator could "exceed[] [his] powers" under FAA Section 10(a)(4). Therefore, if Rent-A-Center prevails and this Court holds that the drafter of an arbitration clause can delegate to an arbitrator the power to decide whether the arbitration clause itself is valid and enforceable, an arbitrator's decision that an arbitration clause is valid and enforceable would not be reviewable under FAA Section 10(a)(4). *See First Options*, 514 U.S. at 942-43.

The other grounds for "review" are even more narrow. For example, arbitration awards may not be overturned even if "a court is convinced [the arbitrator] committed serious error." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Indeed, an arbitration award will stand

even if the arbitrator's factfinding was "silly," *id.* at 39, the arbitrator based his decision on invented contract language, *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005), or the arbitrator committed "even clear or gross errors" of law, *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995). In short, "unless the arbitrator appears utterly to have failed to execute his duty to interpret the contract or the relevant law, the arbitrator's decision must stand." *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 231 (4th Cir. 1991).

As a result of this sharply limited judicial review, confining courts to review of arbitration awards after the fact will not safeguard the fairness of arbitrations. If, as Rent-A-Center proposes, parties can contractually force courts to enforce arbitration agreements without regard to whether they are unconscionable by use of a delegation clause, then no court will *ever* undertake a substantive review of the validity of the arbitration clause. Plainly, that would not do.

C. Relying Upon Arbitrators to Eliminate Abuses of the Arbitration Process Would Not Be Effective.

As noted above, many courts have invalidated arbitration clauses on grounds that they imposed prohibitive arbitration fees or allowed one party to choose the arbitrators. Under Rent-A-Center's

position, so long as a magic sentence is inserted into a standard contract, any challenge to a given arbitration provider's fees or fairness would be addressed to an arbitrator whose income depends upon those same fees or who was chosen by the party that drafted the clause.

A rule that the only judge of the fairness of an arbitrator's fees will be the arbitrator himself is contrary to longstanding notions of due process. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man is permitted to try cases where he has an interest in the outcome."). In *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972), the Court held that it was unconstitutional for a mayor to levy fines against traffic violators when he had an inherent incentive to impose fines due to his supervision of the village's finances. Similarly, in *Connally v. Georgia*, 429 U.S. 245, 246, 251 (1977), a system in which a justice of the peace was paid a prescribed fee for issuing each search warrant but received nothing for denying a warrant was held to violate due process. Likewise, an arbitrator would have a built-in financial incentive to rule against any challenge to his own fees. Having arbitrators judge the propriety of their own compensation, or the fairness of their own rules, is an even more direct conflict of interest than those in *Ward* and *Connally*.

One real-world illustration shows the risks of abuse invited by Rent-A-Center's approach. In 2009, the National Arbitration Forum ("NAF"), formerly the largest consumer arbitration provider in the

United States, was forced to abandon all consumer arbitration in the wake of a law enforcement action that rocked the consumer credit industry. NAF had long been the "go-to arbitrator for consumer credit disputes," handling over 214,000 claims against alleged debtors in 2006 alone. Carrick Mollenkamp, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, Wall St. J., Oct. 15, 2009, at A14. For years, NAF had aggressively marketed itself to lenders.[17] Operating a system that favored lenders was quite lucrative to the owners of the NAF, *see* Mollenkamp, *supra*, as well as to individual arbitrators who handled large numbers of cases for it. One former NAF arbitrator noted, "I could sit on my back porch and do six or seven of these cases a week and make $150 a pop without raising a sweat, and that would be a very substantial supplement to my income. . . . I'd give the [credit-card companies] everything they wanted and more just to keep the business coming."

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[17] *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash Post, Mar. 1, 2000, at E1 ("[A]rbitration industry experts say [that] the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing."); Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 16, 2008, at 72 ("[b]ehind closed doors, NAF [sold] itself to lenders as an effective tool for collecting debts"); Ken Ward, Jr., *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, Apr. 4, 2002, at 5A ("[I]n solicitations and advertisements, NAF has overtly suggested to lenders that NAF arbitration will provide them with a favorable result.").

Chris Serres, *Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions?*, Star Trib. (Minneapolis), May 11, 2008, at 1D.

A law enforcement action filed by the Attorney General of Minnesota (NAF's home state) alleged that the NAF had engaged in fraud, deceptive trade practices, and false advertising, based on the secret fact – supported by substantial documentary evidence attached to the complaint – that NAF was substantially owned by the same entity that owned the largest debt collection law firms in the U.S. (at a time when NAF was hearing tens of thousands of cases brought by those law firms). Ten days after the Minnesota action was commenced, NAF agreed to withdraw from consumer arbitrations.[18]

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[18] *See* Associated Press, *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. Times, July 20, 2009, at B8. NAF's collapse also occurred just a few days before a Congressional hearing into NAF's abusive practices. *See* Staff of the Domestic Policy Subcomm. of the H. Comm. on Oversight and Government Reform, 111th Cong., *Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum* (2009), *available at* http://domesticpolicy.oversight.house.gov/documents/20090721154944.pdf. Moreover, at the Congressional hearing, NAF's C.E.O. admitted under oath that, consistently with key allegations of the Minnesota A.G.'s lawsuit, $42 million in profits from the debt collection enterprise had been distributed to NAF and selected members of its management. *Arbitration or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, July 22, 2009, video webcast at http://domesticpolicy.oversight.house.gov/

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Before these facts came to light, however, the only check on NAF's conduct was provided by courts reviewing arbitration clauses. In the early 1990s, the NAF had adopted rules that required individuals to travel to Minnesota to arbitrate claims, no matter how far they lived from Minnesota or how small their claims were. Applying standard principles of state contract law, a California court held that NAF's rule rendered unconscionable a subprime lender's arbitration clause. *See Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (1993). After the *Patterson* case was decided, the NAF changed its rule to permit consumers to have arbitrations conducted in their local federal judicial district. Nat'l Arbitration Forum, Code of Procedure Rule 32(A) (Aug. 1, 2008). It is extremely unlikely, however, that the NAF itself would ever have struck down its own rule as unconscionable if it had not been forced to do so by the decision in *Patterson*.

Although the majority of arbitration providers operate honorable businesses, court resolution of unconscionability challenges is necessary to prevent extreme abuses. Rent-A-Center's proposed rule would allow companies that impose arbitration clauses upon consumers and employees to eliminate this critical protection.

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story.asp?ID=2551 (oral statements of Michael Kelly, Chief Executive Officer, National Arbitration Forum and Forthright).

III. JACKSON DID NOT AGREE TO DELEGATE THE QUESTION OF THE ARBITRATION CLAUSE'S VALIDITY TO AN ARBITRATOR.

Even if it were *legally* possible to contract around the FAA's requirement that a court ensure the validity of an arbitration clause before enforcing it, Rent-A-Center would still have to demonstrate not only that the parties intended that result using "ordinary state-law principles" of contract construction, *First Options*, 514 U.S. at 944, but also that "clear and unmistakable evidence" proves the parties agreed to give the arbitrator this power. *Id.* For three reasons, this Court should hold that Rent-A-Center has not satisfied this test or, if necessary, remand this case to the district court to decide whether it has.[19]

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[19] This argument was not waived. Pet Br. 19 n 6. While the Ninth Circuit noted that Jackson "does not dispute that the *language* of the Agreement clearly assigns the arbitrability determination to the arbitrator," Pet. App. 13a (emphasis added), the court's decision makes clear that Jackson challenged the enforceability of that language. *See* Pet. App. 9a-10a. Rent-A-Center's suggestion that Jackson has not advanced any argument concerning whether clear and unmistakable evidence in this case establishes the parties' intent to commit these gateway issues to an arbitrator has no merit. *See* Resp't Br. in Opp'n at 3 (Respondent "takes issue with Petitioner's assertion that the intent of the parties was 'clear and unmistakable' "). Jackson's further development of the argument in this brief falls within this Court's rule that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotation omitted); *see also* Sup. Ct. R. 15.2.

First, neither the district court nor the Ninth Circuit found that Rent-A-Center met the *First Options* test. To start with, the district court did not consider whether – or find that – the delegation clause complied with "ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Jackson opposed the motion to compel on the ground that the entire arbitration agreement, including the delegation clause, was unconscionable. *See* J.A. 39-47. The district court did not address whether the delegation clause was unconscionable, but, instead, rejected Jackson's argument that the arbitration agreement was unconscionable because of its costs provision, without reaching any other substantive unconscionability or procedural unconscionability issues. *See* Pet. App. 1a-6a.

The district court also did not consider whether – or find that – there was "clear and unmistakable evidence" that Jackson had agreed to delegate arbitrability questions to the arbitrator. Its decision does include words to that effect, *see* Pet. App. 4a, but, read in context, they show that the district court was not making any such finding at all. Rather, the district court held that, because Jackson's unconscionability challenge went to the arbitration agreement as a whole – and not just the delegation clause – the challenge needed to be decided by the arbitrator. It said, Pet. App. 4a:

> Where the contract agreeing to arbitrate is challenged as whole, it is for the arbitrator to decide the validity of the agreement. [Citing

> *Buckeye.*] The Agreement to Arbitrate clearly and unmistakenly [sic] provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable. Plaintiff challenges the agreement to arbitrate as a whole. Plaintiff claims it is void as unconscionable. When there is an agreement to arbitrate, the court cannot hear challenges to the contract as a whole. [Citing *Buckeye.*] As such the question of arbitrability is a question for the arbitrator.

The district court's ruling misapplied *Buckeye*, which said that challenges to *contracts* as a whole are to be decided by arbitrators. This Court's severability cases have long held that challenges to *arbitration agreements* (as opposed to contracts as a whole) are to be decided by courts. *See supra*, Part I.A. This Court did say in *First Options* that parties could agree to assign questions of arbitrability (referring to the scope of arbitration clauses) to arbitrators if their agreement to do so was valid under state law and clear and unmistakable, 514 U.S. at 944, but, in this case, the district court never found that either of those conditions was met.

On appeal, the Ninth Circuit overturned both the district court's decision that the arbitrator should decide whether the parties had agreed to arbitrate questions of the arbitration clause's validity and its decision that the arbitration clause was not unconscionable. As to the former, the appeals court said:

> *First Options* . . . directs that as a threshold matter the court must decide – by applying "ordinary state-law principles" – whether the parties agreed to arbitrate arbitrability. The Employer urges us to consider only that Jackson signed the Agreement . . . To engage in an artificially contracted review of what the parties agreed to here would contravene this principle and violate the proper role of cooperative federalism. Rather, we hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.

Pet. App. 15a. (citations omitted). Clarifying the "threshold question of unconscionability" it was referring to, the Ninth Circuit said, "We hold that where, as here, an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, *a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter.*" Pet. App. 18a. (emphasis added). Because the district court had not decided whether the delegation clause was itself enforceable and had not considered all of Jackson's unconscionability arguments, the Ninth Circuit remanded the case to the district court to complete its work. Pet. App. 20a. As a result, *no* court below has held that the parties entered into a valid, clear, and unmistakable delegation clause.

Second, the parties did not enter into such an agreement here. As this Court said in *First Options*, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability) courts generally (though with a qualification we discuss below) should apply ordinary state law principles that govern the formation of contracts." 514 U.S. at 944. The qualification the Court discussed was that, in addition to applying ordinary state law principles, courts also had to find "clear and unmistakable evidence" that the parties agreed to arbitrate questions of arbitrability. Although the *First Options* exception is limited to scope, *see supra*, Part I.C, even if it were not, neither part of the exception is satisfied here.

Under Nevada state law, which applies in this case, a contract is unconscionable when "the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 514 P.2d 654, 657 (Nev. 1973). A sliding scale approach is applied. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2002) ("Generally, both procedural and substantive unconscionability must be present. . . . However, less evidence of substantive unconscionability is required in cases involving great procedural unconscionability.") (internal quotations omitted).

This case involves great procedural unconscionability. Respondent was required to sign the agreement to get a job or a promotion. Rent-A-Center requires "all new employees" and "all employees who

receive promotions" to "agree to arbitrate all past, present, and future disputes." J.A. 27.

The delegation clause is also substantively unconscionable. Contrary to Rent-A-Center's contention, the Agreement does not confer "*exclusive* authority" to an arbitrator "to decide a claim of unenforceability due to alleged unconscionability." Pet. Br. 3 (emphasis added). Instead, the clause included an important *quid pro quo*: in exchange for initially allowing an arbitrator to decide certain gateway questions, the clause provides for plenary post-arbitration judicial review – substantially more stringent scrutiny than provided by the FAA. *Compare* J.A. 36 *with* 9 U.S.C. § 10. Thus, the arbitration clause, when read in its entirety, evidences an intent to contract out of not only the FAA's requirement that a court initially determine whether an arbitration clause is "valid and enforceable" before enforcing it, but also the FAA's limits on judicial review.[20]

But therein lies the rub, because the provision for enhanced judicial review of the arbitrator's decision is unenforceable. This Court has held FAA Section 10 contains the statute's "exclusive grounds"

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[20] *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 81 (1998) (rejecting reliance on one clause "in isolation" to demonstrate clear and unmistakable intent of parties to submit specific issue to arbitrator); *Canfora v. Coast Hotels and Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005) (parties' intent must be "gleaned from reading the contract as a whole in light of the circumstance under which it was entered")

for post-arbitration judicial review, and that parties cannot contractually agree to expand those grounds for judicial review. *Hall Street,* 552 U.S. at 584. Because the parties' purported waiver of FAA Section 2 hinged on expanded post-arbitration judicial review that is not available because it violates FAA Section 10, the agreement to arbitrate arbitrability is one-sided and substantively unconscionable.[21]

Similarly, Rent-A-Center has not provided "clear and unmistakable evidence" that the parties intended to enforce the pre-dispute waiver absent the corresponding expansive post-arbitration judicial review. *See* Restatement (Second) of Contracts § 184 (1981) ("[A]n agreement may be unenforceable as to corresponding equivalents on each side"). Put another way, it is not clear and unmistakable that the parties intended to take away from the courts the ultimate power to decide the enforceability of the arbitration clause and delegate that power to the arbitrator, because their contract as written would have left the

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[21] Rent-A-Center wants to have its cake and eat it too, in essence seeking to enforce one half of this bargain (gateway delegation) to its advantage, while avoiding the potential disadvantage of the unenforceable second half (expanded judicial review). The law does not permit this result. *See* Restatement (Second) of Contracts § 184 cmt. b (1981) ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term contained in a standard form supplied by the dominant party argues against aiding him in this request.")

courts with plenary power to decide that legal issue. But Rent-A-Center, in light of the result in *Hall Street*, is now asking the Court to enforce only half of the parties' agreement. Even if the "clear and unmistakable evidence" test applies here, "courts [should] hesitate to interpret silence or ambiguity on the 'who decides arbitrability' point as giving arbitrators that power." 514 U.S. at 945.

First Options itself, moreover, demonstrates, why the "clear and unmistakable evidence" required is lacking here. In that case, sophisticated parties personally negotiated the agreements at issue in great detail. Even so, the Court looked beyond the language of the agreements themselves, reviewed the parties' interactions and the context in which they took place, and found no "clear and unmistakable evidence." In this case, the only evidence of record is the language of Rent-A-Center's non-negotiable agreement and the fact that the company required Jackson to sign it. That is hardly compelling evidence of a meeting of the minds on "who (primarily) should decide arbitrability" or "upon the significance of having arbitrators decide the scope of their own power." 514 U.S. at 945.

Finally, if this Court decides that further inquiry into Nevada law or the facts is needed to decide whether the *First Options* test is met, this case should be remanded to the district court for that inquiry. As noted above, the courts below have not yet ruled on whether the agreement to arbitrate arbitrability questions in this case satisfies *First Options*.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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REPLY BRIEF

No. 09-497

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v.

ANTONIO JACKSON,
Respondent.

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening brief remains correct.

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Respondent Antonio Jackson ("Jackson") signed an arbitration agreement covering his claims against Petitioner Rent-A-Center, West, Inc. ("RAC"). The agreement states that any issues relating to its "enforceability" are within the "exclusive authority" of the arbitrator. Jt. App. 34. Because the primary purpose of the Federal Arbitration Act ("FAA") is to enforce arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985), the agreement is presumptively enforceable, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

To rebut the presumption, Jackson must establish that Congress, either in the FAA or some other federal statute, intended to preclude enforcement of the agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). To this end, Jackson makes three primary arguments, but both individually and in concert, they do not overcome the FAA's strong presumption of enforceability.

First, Jackson argues that Section 2 of the FAA, 9 U.S.C. § 2, bars parties from voluntarily delegating contract enforceability issues to the arbitrator. However, while Section 2 sets forth the FAA's central policy favoring enforcement of arbitration agreements, it contains no language assigning the determination of enforceability to any specific forum or, as is relevant here, categorically withholding it from the arbitrator.

Similarly, Jackson argues that Section 4 of the FAA, 9 U.S.C. § 4, requires that courts decide all challenges to the enforceability of the arbitration agreement. However, Section 4 says no such thing and states instead that issues regarding the "making" of the agreement to arbitrate, a limited term applicable to factual issues of formation, may be determined by a judge or a jury under appropriate circumstances. Where, as here, no "making" issue is presented, Section 4 mandates that the court direct the parties to arbitration "in accordance with the terms" of their agreement.

Finally, Jackson advances various speculative and exaggerated policy arguments that do not rebut the FAA's textual presumption in favor of the enforcement of arbitration agreements. The judgment of the court of appeals should be reversed.

II. ARGUMENT

A. An Arbitration Agreement That Clearly and Unmistakably Delegates Contract Enforceability Issues to an Arbitrator Does Not Violate Section 2.

Paying scant attention to *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) ("*AT&T*"), *or First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("*First Options*"), which authorize delegation of arbitrability issues to the arbitrator, Jackson argues that the language of Section 2 compels the conclusion that parties to an arbitration agreement may *never* delegate questions of contract validity or enforceability to the arbitral forum and that only courts can assess Section 2's enforcement criteria. Brief for Respondent ("Resp. Br.") 10-11, 14-15.

However, Section 2 provides no textual support for Jackson's claims. This Court will "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Yet, Jackson requests that the Court do just that by adding a requirement that only courts may decide the validity and enforceability of an arbitration agreement. But Section 2 does not address "who decides"; it only declares the overriding federal policy of enforceability which must be applied whether it is a federal court, state court or an arbitration panel that is deciding the enforceability issue. *See, e.g., Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1271 (2009) ("The 'body of federal substantive law' generated by elaboration of FAA § 2 is equally binding on state and federal courts." (citations omitted)).

Without any express language to support his claim that Section 2 compels the result he advocates, Jackson resorts to fanciful inferences. Jackson refers to what he characterizes as Section 2's "three basic requirements" for enforcement of an arbitration agreement: "First, there must be a written agreement. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds." Resp. Br. 11. From this, Jackson jumps to the conclusion that the court is the exclusive arbiter of each condition.

However, there are conspicuous omissions from Jackson's summary which defeat his argument. For example, Section 2's requirement of a written agreement addresses "an agreement in writing to submit to arbitration an existing controversy *arising out of* such a contract * * * ." 9 U.S.C. § 2 (emphasis added). Jackson omits this language. He omits similar language from his description of Section 2's interstate commerce requirement, as the statute actually makes enforceable "a written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of* such contract * * * ." *Id.* (emphasis added).

The language of Section 2 omitted from Jackson's summary is critical because that language plainly relates to the scope of the agreement to arbitrate, *i.e.*, the dispute must be one "arising out of" the underlying contract. This Court held, however, in *AT&T* and *First Options* that issues regarding the scope of an arbitration clause may be delegated to the arbitrator by clear and unmistakable language. *AT&T*, 475 U.S. at 649; *First Options*, 514 U.S. at 944. Jackson, as he must, concedes this principle. Resp. Br. 24.

Thus, Jackson's contention that all issues posed by Section 2 are for the court in all instances is inconsistent with this Court's precedents. Because the "arising out of" language in Section 2 relates to the scope of an agreement to arbitrate, then even the narrow area to which Jackson would confine *AT&T* and *First Options* falls away—if no Section 2 issue is arbitrable, then, as Jackson would have it, scope is not arbitrable, because scope is *also* addressed in Section 2. If Jackson prevails, therefore, the *AT&T/First Options* rule withers to nothing.

Indeed, another case given little attention by Jackson directly responds to his argument that contract validity and enforceability issues are outside the coverage of *AT&T/First Options*. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), the Court states *exactly* the opposite:

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT&T* [, 475 U.S. at 649]. These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 154 L. Ed. 2d 491, 123 S.Ct. 588 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. * * *.
>
> The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the

> underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter.*

(Italics in original; underlining added.) *See also Howsam*, 537 U.S. at 83-84 ("a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide" unless the parties clearly and unmistakably provide otherwise).

In the present case, the parties have "agreed to arbitrate a matter," *Bazzle*, 539 U.S. at 452, which qualifies as a "question of arbitrability," *Howsam*, 537 U.S. at 84, that can be delegated to the arbitrator under *AT&T/First Options*, namely, the enforceability of their arbitration agreement. They have done so clearly and unmistakably, as found by the district court, Pet. App. 4a, and by the court of appeals, Pet. App. 13a.

First Options holds: "Courts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.*" 514 U.S. at 944 (emphasis added). It reaffirms "the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration * * *." *Id.* at 945.[1]

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[1] Jackson cites *Green Tree Fin. Corp.-Ala. v. Randolph* ("*Randolph*"), 531 U.S. 79, 83 n.1 (2000), for the proposition that this Court rejected application of a broad delegation clause to contract validity questions (Resp. Br. 29), when, in fact, in *Randolph* the applicability of the delegation clause never came up. *Randolph* cannot be relied on as precedent for an issue it never addressed. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to

Following the *AT&T/First Options* rule, courts have routinely upheld arbitration clauses that clearly and unmistakably delegate contract enforceability issues, including unconscionability, to the arbitrator. Pet. Brief 27-29.

Additionally, countless private parties have contracted in reliance on the *AT&T/First Options* rule. *See, e.g.*, American Arbitration Association ("AAA") Commercial and Employment Arbitration Rules and Mediation Procedures; JAMS Comprehensive and Employment Arbitration Rules & Procedures. Pet. App. 37a, 38a. To adopt Jackson's position that Section 2 outright bars parties to arbitration agreements from ever permitting arbitrators to decide contract enforceability issues disrupts economic relationships formed in reliance on the *AT&T/First Options* rule. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (where "private parties have likely written contracts relying" on Court's prior precedent, it is "inappropriate to reconsider what is by now well-established law").

RAC has never claimed, as Jackson contends, that the unconscionability defense is avoided by the delegation of contract enforceability issues to the arbitrator. Resp. Br. 11. Rather, RAC has argued at every level that the unconscionability issue goes to the arbitrator for decision. *See, e.g.*, Jt. App. 17 (district court); Pet. App. 13a (court of appeals); Pet. Brief 14 (Supreme Court). If RAC prevails, the arbitrator will decide Jackson's unconscionability claims.[2]

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the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[2] Jackson's analogy to a forum selection clause in a non-arbitration contract breaks down because it is based on the false premise that absent court review, an arbitration agreement

Jackson's Section 2 argument, based as it is on writing words into the statute that are not there and omitting words that are, should be rejected.

B. An Arbitration Agreement That Clearly and Unmistakably Delegates Contract Enforceability Issues to an Arbitrator Does Not Violate Section 4.

As with his interpretation of Section 2, Jackson attempts to re-make Section 4 into a statute that precludes delegation of contract enforceability issues to the arbitrator. But Section 4 contains no language that would preclude enforcement of a clear and unmistakable agreement to delegate such issues. Section 4 states that a district court that otherwise possesses subject-matter jurisdiction shall, upon petition by a party to the arbitration agreement, direct "the parties to proceed to arbitration in accordance with the terms of the agreement" if the court is satisfied that the "making of the agreement for arbitration * * * is not in issue." 9 U.S.C. § 4. If the "making of the arbitration agreement" is "in issue" the district court "shall hear and determine such issue," unless a timely demand for jury trial is made, in which case the jury determines whether "an agreement in writing for arbitration was made * * *." *Id.* If the jury finds no written agreement to arbitrate was "made," the petition to compel arbitration "shall be dismissed," while if "the jury find that an agreement for arbitration was made in writing," the district court "shall make an order summarily directing the

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becomes self-enforcing. Resp. Br. 31-34. However, resolution of the merits of the underlying dispute will not occur until the arbitrator first decides Jackson's unconscionability defense.

parties to proceed with the arbitration in accordance with the terms thereof." *Id.*

Jackson and certain of his *amici* argue that the terms "making" and "made" as used in Section 4 are coextensive with the phrase "valid, irrevocable, and enforceable" as used in Section 2 and thus only a court may determine the validity and enforceability of the agreement to arbitrate and an arbitrator may never do so. Resp. Br. 18; *Amicus* Brief of AFL-CIO 8. Thus, Jackson rewrites Section 4 to expand the "making" of a contract to include its "validity, revocability, and enforceability." He correspondingly distorts Section 4's later references to a jury's factual findings as to whether a written arbitration agreement was "made" also to include a legal determination whether the agreement was valid, irrevocable, and enforceable, which it seems unlikely Congress meant to delegate to juries.

Moreover, Jackson ignores that, if Congress meant Section 2 and Section 4 to be coextensive, it would have used identical terms in each provision. Because it did not, the different terms used must be given different meanings. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion"). Jackson's suggestion that the words "making" and "made" as used in Section 4 are identical to the phrase "valid, irrevocable, and enforceable" as used in Section 2 must be rejected.

In fact, the words "making" and "made" as used in Section 4 indicate an inquiry that is nowhere near as broad as the inquiry whether a contract is valid

and/or enforceable. As recognized in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006), "[t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." The words "making" and "made" as used in Section 4 embrace the latter inquiry focusing on distinctly factual issues susceptible to a jury's determination: whether the parties entered into an agreement to arbitrate their dispute and whether their mutual assent to arbitrate was adequately memorialized in writing. For example, existential issues such as whether the party resisting arbitration actually signed an agreement go to whether an agreement to arbitrate was in fact concluded, but these issues are fundamentally different from whether an agreement already formed is enforceable in whole or in part. *See Buckeye Check Cashing*, 546 U.S. at 444 n.1 (suggesting the same).

The distinction between issues involving the *very existence* of an agreement to arbitrate, which may be subsumed within the words "making" and "made" under Section 4, and contract enforceability issues, which are not (but which under *First Options* are presumptively determined by the court absent clear and unmistakable language to the contrary) is supported by well-established principles of contract law. The word "agreement" is defined as the "manifestation of mutual assent on the part of two or more persons." Restatement (Second) of Contracts ("Restatement") § 3. "Agreement has in some respects a wider meaning than contract, bargain or promise" and "contains no implication that legal consequences are or are not produced." Restatement § 3, cmt. a. Therefore, under the Restatement, which has been adopted in Nevada, *Laxalt v. McClatchy*, 116 F.R.D.

438, 448 (D. Nev. 1987), the "making" inquiry under Section 4 is whether, viewed objectively, the parties mutually assented to an arbitration agreement, not whether a "made" agreement was legally valid and/or enforceable.

This principle is consistent with this Court's statement in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967), that fraud in the inducement involves the "making" of an agreement to arbitrate. Fraud in the inducement is present when "a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying * * *." Restatement § 164(1). Thus, where the misrepresentation "substantially contributed to [the party's] decision to make the contract," the defense will apply. Restatement § 167, cmt. a. Whether the misrepresentation induces the party to manifest assent is a question of fact. Restatement § 164, cmt. c.

Unconscionability, on the other hand, is based upon a policy decision that an agreement that has unquestionably been "made" is unenforceable because of the substantive unfairness of its terms. Restatement § 208 ("If a contract or term thereof is unconscionable at the time the contract is *made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." (emphasis added)). Before the FAA's enactment, this Court recognized that unconscionability is concerned with whether a "made" contract is enforceable. *See, e.g., Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892) ("To stay the arm of a court of equity from

enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such a contract to a court of law.") After the FAA's enactment, and in accordance with *AT&T/First Options*, an arbitrator can play the same role.

Unlike fraud in the inducement, which questions the very existence of mutual assent and may be decided as a factual matter by a jury under Section 4 without interpretation of the contract's substantive terms, unconscionability depends on an analysis of those terms to determine if they are so unfair that they will not, as a matter of policy, be enforced.[3] This determination is made as a matter of law. *See, e.g.*, Farnsworth, E. Allan, *Farnsworth on Contracts* 579-80 (3d ed. 2004) ("unconscionability was historically a matter for equity where there was no jury * * *"); Restatement § 208, cmt. f (a "determination that a contract or term is unconscionable is made by the court in the light of all the material facts" and any "findings of fact are made by the court, rather than by a jury * * *").

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[3] The procedural component of unconscionability does not rise to the level of contract-negating defenses such as fraud and duress. That is why there must be a determination that the contract at issue contains substantively unconscionable terms for the court to refuse to enforce it. *See, e.g., D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004) (Nevada law requires substantively unconscionable terms).

Treating unconscionability as relevant to whether an arbitration agreement has been "made" is therefore inconsistent with the text of Section 4, which states that "making" issues are for the jury to decide if a timely demand is made. It is also inconsistent with the FAA's legislative history, which establishes that Section 4 was intended to provide "a method for the summary trial of any claim that no arbitration agreement ever was made * * *." H.R. Rep. No. 68-96, at 2 (1924). This provision was included to protect the right to a jury trial and to prevent a party from being bound to an arbitration agreement which was never entered into. Thus, the following colloquy took place between Senator Sterling, the Chairman of the Joint Subcommittee holding hearings on the FAA and Julius Cohen, the principal drafter of the FAA:

> Mr. Cohen: The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on.
>
> The Chairman: The issue there is whether there is an agreement to arbitrate or not.
>
> Mr. Cohen: Exactly. Now, if you come in there you can demand a trial by jury, right away, summarily, and that is the issue that is passed on.

Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Senate

and House Subcomms. of the Comms. on the Judiciary, 68th Cong., at 17 (1924).

The right to a jury trial provided in Section 4 is therefore limited to determining whether the party indeed entered into an agreement to arbitrate, and the word "made" is directed to the physical execution of a "paper" which memorializes that assent. *Id.* Section 4 does not grant the party a right to a jury trial regarding an equitable defense such as unconscionability. Rather, the jury trial right protected by Section 4 applies only when there are factual issues regarding the existence of the agreement itself. *See, e.g., Mazera v. Varsity Ford Mgmt. Services*, 565 F.3d 997, 1001-02 (6th Cir. 2009) (claims that arbitration agreement was invalid based on, *inter alia*, allegations of disparate bargaining power, language problems and lack of consideration do not go to the "making" of the agreement); *Drews Distributing, Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001) (jury trial is limited to situations where there has been an unequivocal denial, supported by evidence, that an arbitration agreement was entered into).[4]

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[4] In this regard, Jackson's claim that RAC's position permits enforcement of forged agreements fails for two reasons. Resp. Br. 13. First, if Jackson claimed he never signed the arbitration agreement, a "making" issue under Section 4 is placed "in issue" and either the court or the jury, if one is demanded, summarily tries that factual issue. *See Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509-10 (7th Cir. 2003) (allegation of forged signature on arbitration agreement required a trial over the "making" of the agreement). Second, as a threshold issue, a court faced with a claim under *First Options* that the parties clearly and unmistakably agreed to arbitrate arbitrability must first determine that such an agreement does, in fact, exist. *First Options*, 514 U.S. at 944. Under either scenario, one who did not enter into an agreement to arbitrate will not be compelled to arbitrate.

However, if unconscionability goes to whether a contract was "made," the fears of dissenting Judge Hall below are realized because "the majority's opinion will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court based on just the bare allegation of unconscionability," Pet. App. 22a., breeding litigation out of a statute designed to prevent it. Because Jackson's interpretation of Section 4 undermines the FAA's central principle of enforceability and interferes with the rapid and unobstructed reference of his claims to the arbitral forum, this Court should adopt the views of those lower courts that have held that unconscionability does not involve the "making" of an agreement to arbitrate. *See, e.g., Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (party resisting enforcement of arbitration agreement on basis of procedural and substantive unconscionability was not entitled to jury trial because issues are not "the equivalent of questioning the 'making' of an arbitration agreement"); *Madrigal v. New Cingular Wireless Servs.*, 2009 U.S. Dist. LEXIS 72416, *20-21 (E.D. Cal. Aug. 17, 2009) (plaintiffs' allegation of unconscionability disputes "the validity of the agreement made, not that they ever made an arbitration agreement to begin with" and hence provision affording arbitrator exclusive authority to determine issue is not precluded by Section 4).[5]

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[5] The "separability doctrine" of *Prima Paint/Buckeye* does not assist Jackson because in neither case did this Court address the issue of a "clear and unmistakable" agreement authorizing the arbitrator to determine enforceability of the arbitration agreement.

Like his Section 2 argument, Jackson's Section 4 argument is without merit. Because Jackson never challenged the "making" of the Arbitration Agreement, Section 4 mandates that the court direct "the parties to proceed with the arbitration in accordance with the terms" of the agreement. 9 U.S.C. § 4. While other "non-making" issues such as unconscionability would have otherwise gone to the court because the parties would ordinarily have expected a court to decide them, here the parties "clearly and unmistakably" agreed that these issues should instead be decided by the arbitrator. *First Options*, 514 U.S. at 944-45. The FAA requires enforcement of this agreement.

C. Jackson's Speculation That Continued Implementation Of The *AT&T/First Options* Rule Will Result In Abuses Is Insufficient To Deny Enforcement Of The Arbitration Agreement.

Without textual support for his position, Jackson relies on various public policy arguments which do not assist the Court in its statutory interpretation. *See Hall Street Assocs, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008) (the policy consequences of the Court's holding gives it "no business" to expand the statute's text). Jackson's arguments proceed as follows: (1) some arbitration agreements contain unconscionable terms, Resp. Br. 36-39; (2) arbitrators should not be permitted to determine unconscionability because this invites abuse and post-award review is inadequate, Resp. Br. 44-49; and (3) allowing arbitrators a role in the development of unconscionability doctrine is ineffective, Resp. Br. 49-50.

While Jackson's first point is undoubtedly true, he concedes that arbitration clauses have only "on occasion" been abused and that cases striking down arbitration agreements are in the "minority." Resp. Br. 37, 43. What he omits is that private parties and leading ADR services such as AAA and JAMS have relied on the *AT&T/First Options* rule for many years to permit parties to clearly and unmistakably authorize arbitrators to determine unconscionability. While Jackson catalogs a number of court decisions rejecting enforcement of arbitration agreements on the ground of unconscionability, he ignores that arbitrators themselves have done the same. *See Amicus* Brief of Pacific Legal Foundation 14-15.

Jackson's second argument, that it is unfair for parties to agree to have unconscionability decided by an arbitrator, is ill-founded. In support, Jackson trots out a "parade of horribles" in which parties will be forced to travel to faraway locales and pay exorbitant costs as a condition of participation in arbitration. Resp. Br. 45-47. Missing from Jackson's attack is any empirical evidence that reliance on the *AT&T/First Options* rule to permit arbitrators to determine unconscionability has in fact resulted in the inequities predicted.

But more fundamentally, Jackson exaggerates the reach of RAC's argument. If a party meets the high hurdle of proving that the agreement does not provide access to arbitration and that the unconscionability defense hence cannot be decided in that forum, the court, as a threshold matter, could refuse to compel arbitration either in reliance upon this Court's decision in *Randolph* or upon a finding that there is no "clear and unmistakable" agreement to arbitrate arbitrability under *First Options*. Thus, in

Awuah v. Coverall North America, Inc., 554 F.3d 7, 12-13 (1st Cir. 2009), the First Circuit, citing *Randolph*, held that the issue whether the "arbitration regime * * * is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses," is for the court to decide. However, the First Circuit distinguished these situations where access to arbitration was "impossibly burdensome" from unconscionability, "essentially a fairness issue," which could be delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. *Id.*

Jackson proffered no evidence that he will be unable to obtain a decision on his unconscionability challenge before a mutually selected arbitrator. Rather, he makes only "garden-variety" claims that the arbitration agreement contains some unfair provisions.[6]

In this regard, Jackson is in no better position than the parties who unsuccessfully resisted arbitration in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), and *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). In *Vimar*, the

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[6] In making these claims, Jackson selectively quotes the arbitration agreement, deleting language unfavorable to him. Resp. Br. 2-3. He ignores that the fee and cost-splitting provision (which was held conscionable by both the district court, Pet. App. 5a, and the court of appeals, Pet. App. 18a-19a) states that, "[i]n the event the law of the jurisdiction in which the arbitration is held requires a different allocation of fees and costs for this Agreement to be enforceable, then such law shall be followed." Jt. App. 36. Regarding discovery, Jackson similarly ignores that the agreement permits additional discovery "where the arbitrator selected so orders." Jt. App. 32.

Court held that an arbitration agreement was enforceable even though the resisting party feared that the assigned foreign arbitral panel would not abide by controlling federal law because "[a]t this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result." *Vimar*, 515 U.S. at 540. Similarly, in *PacifiCare*, the resisting party speculated that the arbitration agreement might limit RICO's remedial provisions. *PacifiCare*, 538 U.S. at 406-07. The Court, following *Vimar*, held that the arbitration should go forward because it did "not know how the arbitrator" would construe the agreement. *Id.* at 407. *See also Randolph*, 531 U.S. at 91 ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."). An inchoate fear, thus, does not suffice to deny enforcement of the parties' arbitration agreement.

The same can be said here. The arbitrator may find the agreement wholly conscionable or wholly unconscionable or the arbitrator may sever any unfair terms and enforce the balance of the agreement.

This leads to Jackson's next argument: that the arbitrator should not be permitted to determine unconscionability because judicial review of the arbitration decision is too limited. As this Court has recognized, a remedy for a party victimized by an arbitrator's failure and refusal to enforce controlling federal law is accessible at the award enforcement stage. *Vimar*, 515 U.S. at 540. This is so because, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

Ignoring these principles, Jackson attacks the *AT&T/First Options* rule, arguing that the limited grounds for appeal of an arbitrator's ruling on unconscionability are insufficient to guarantee fairness. Resp. Br. 45-49. His attack fails for several reasons. First, in *First Options*, this Court was cognizant of the different standards of judicial review, depending on whether a court or arbitrator was delegated responsibility to decide an issue of arbitrability. *First Options*, 514 U.S. at 943. Considering the fact that the arbitrator's decision was more difficult to reverse, the Court required a "clear and unmistakable" agreement. *Id.* at 942-44.

Second, Jackson exaggerates the limited scope of judicial review of the arbitrator's award. While this Court in *Hall Street* held that Section 10, 9 U.S.C. § 10, provides the exclusive grounds for vacatur of an arbitration award under the FAA, 552 U.S. at 581, it did not hold that other standards of review, such as "manifest disregard" of the law, *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), or "public policy," *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983), did not come within Section 10's purview. It is therefore by no means settled that an aggrieved party will be deprived of meaningful review, as Jackson asserts.

But even if only a very narrow review of the arbitrator's award is permitted, Jackson does not articulate why this is unfair. What he is left with is only the *possibility* that an arbitrator and a judge would reach different conclusions regarding the

enforcement of the arbitration agreement and that a different standard of judicial review would apply depending on who decided the issue. But these possibilities affect both parties equally, so RAC would have the same difficulty vacating an arbitral finding of unconscionability as Jackson would have vacating an award enforcing the agreement. And since only *denials* of a petition to compel arbitration are automatically appealable, not orders compelling arbitration, 9 U.S.C. § 16(a)(1)(B), Jackson would be forced to arbitrate the merits of his case regardless whether his unconscionability arguments are rejected by a court *or* an arbitrator.

Jackson's final policy argument, that permitting arbitrators to rule on unconscionability would be ineffective, is also groundless. Resp. Br. 49. While Jackson raises the specter of arbitral bias, he ignores the fact that the FAA contains a specific provision permitting vacatur for "evident partiality," 9 U.S.C. § 10(a)(2). Moreover, his claims and those of his *amici* are infected with the same type of suspicion and mistrust of arbitrators that this Court's decisions have guarded against. *See* Pet. Br. 37 (discussing cases).

The FAA creates "a body of federal substantive law." *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). The *AT&T/First Options* rule, which permits parties to an arbitration contract to delegate issues of arbitrability to the arbitrator so long as their agreement does so "clearly and unmistakably," is part of that body of federal law.[7] Jackson's speculative

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[7] Thus, Jackson's reliance on the Revised Uniform Arbitration Act (Resp. Br. 40-41) is misplaced, as the framers recognized that this Court's "case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting con-

public policy arguments cannot override that law and should be rejected by this Court.

D. There Is No Legitimate Debate Whether The Arbitration Agreement Clearly And Unmistakably Commits The Unconscionability Issue To The Arbitrator.

Jackson concludes by contending that the Arbitration Agreement did not clearly and unmistakably commit the issue of contract enforceability to the arbitrator. Resp. Br. 54-61. Importantly, Jackson makes no claim that he raised this specific issue below, admitting it first surfaced in his opposition to the petition for certiorari in this Court. Resp. Br. 54 n.19. Under these circumstances, this argument is waived. *See 14 Penn Plaza LLC v. Pyett*, __ U.S. __, 129 S. Ct. 1456, 1473-74 (2009) (where respondents failed to contest in either the district court or the court of appeals that they had clearly and unmistakably agreed to arbitrate and where this Court "granted review of the question presented based on that understanding," respondents' "alternative arguments for affirmance were forfeited").

But even if it was not waived, Jackson's argument is without merit. Incredibly, Jackson contends that neither the district court nor the Ninth Circuit found a clear and unmistakable agreement to arbitrate "arbitrability." Resp. Br. 55-57. But the district court could not have been clearer: "The Agreement to Arbitrate *clearly and unmistakably provides the arbi-*

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tractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA." Nat'l Conference of Comm'rs of Uniform State Laws, *Uniform Arbitration Act*, Prefatory Note, p. 2.

trator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." Pet. App. 4a (emphasis added). The Ninth Circuit was equally clear, stating that "*Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator.*" *Id.* at 13a (emphasis added). Jackson's claim that no findings were made does not withstand scrutiny.

Belatedly contesting these findings, Jackson and his *amici* attempt to inject irrelevant factual issues regarding the circumstances surrounding the agreement, the parties' intent and their subjective understanding of the agreement's terms. Resp. Br. 58, 60; *Amicus* Brief of SEIU 14-15, 20, 29-30. However, because the delegation clause here is "clear and unmistakable" on its face, no fact-finding is appropriate under *AT&T/First Options*. In any event Jackson's irrelevant, speculative and previously unpresented allegations are not appropriately raised before this Court. *See 14 Penn Plaza, LLC*, 129 S. Ct. at 1474 (court typically will not affirm on alternative grounds not presented).

III. CONCLUSION

The judgment of the court of appeals should be reversed, and Jackson should be compelled to arbitrate his claims.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-497

IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ Certiorari to the United States Court of Appeals for the Ninth Circuit

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ is committed to the ideal of access to justice for all Americans for redress of grievances. AAJ is concerned that one-sided mandatory arbitration "agreements" are increasingly being drafted into consumers' and workers' contracts. These provisions are often so onerous that they not only shut wronged individuals out of the courts, they immunize the drafters from any accountability at all. AAJ believes that judicial review for unconscionability is essential to protect ordinary Americans' access to justice.

AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older people, AARP supports laws and public policies designed to protect and preserve the legal means to seek redress when older persons are harmed in the consumer and employment marketplace. AARP advocates for improved access to the civil justice system for people with small claims or seeking to enforce important civil and statutory rights, and supports the availability of the full range of enforcement tools for consumer protections and employment rights.

Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court.[1]

SUMMARY OF THE ARGUMENT

1. Petitioner's primary contention—that the drafters of arbitration provisions are guaranteed and entitled to have them enforced "as written"—is not and should not be the law.

To the contrary, courts historically have sought to avoid unjust results dictated by egregiously one-sided contracts. Courts sitting in equity developed the doctrine of unconscionability, which was readily adopted by American courts, as reflected in the Uniform Commercial Code and, more broadly, in the Restatement (Second) of Contracts.

The doctrine that equity will not enforce an unconscionable contract has generally served the function of a safety valve in the law of contracts. It provides a tool for courts to decline to enforce unjust contracts without distorting contract law or undermining its predictability.

Congress explicitly adopted the unconscionability doctrine with respect to arbitration agreements. Section 2 of the Federal Arbitration Act ("FAA") mandates enforcement of such agreements, "save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is

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[1]Pursuant to Rule 37.6, *Amici* disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amici Curiae*, their members, or counsel make a monetary contribution to its preparation.

essentially an equal protection guarantee for arbitration agreements, according them the same enforceability as other contracts, but not more. As this Court has repeatedly made clear, such agreements may be held unenforceable if unconscionable under state law.

This "safety valve" function has become vastly more important as standardized contracts of adhesion have become ubiquitous. The notion that such contracts express the "agreement" of the parties is a legal fiction. Nevertheless, the law recognizes that such standardized forms are essential to the efficient operation of a mass-market economy. The fact that courts can refuse enforcement if the drafting party has abused its power by imposing egregiously unfair terms helps foster acceptance of the use of standard form contracts. The unconscionability doctrine provides an assurance of basic due process for individuals who must accept such contracts.

This Court has repeatedly stated, and Petitioner agrees, that the decision whether an agreement to arbitrate is unconscionable is generally for the court. "Arbitrability" decisions that involve ascertaining the meaning or scope of the agreement may be assigned by the parties to the arbitrator. But this Court has never suggested that whether an agreement to arbitrate is unconscionable, a question that requires application of the state's general law of contracts, may be turned over to the arbitrator. That decision is in fact closely related to the gateway question of whether the parties actually agreed to a contract, a question that is indisputably for the court. Yet, Petitioner asks this Court to allow the

drafting party to strip the courts of jurisdiction to decide unconscionability.

2. Petitioner's proposal that the drafting party be allowed to make the arbitrator the sole judge of whether an arbitration clause is unconscionable is wholly unworkable.

There are currently "millions" of contracts that, like the contract in this case, give the unconscionability decision to the arbitrator, and Petitioner asserts that arbitrators are "fully capable" of making that determination. Yet, Petitioner is unable to point to a single instance in which an arbitrator ruled an arbitration agreement unconscionable and therefore unenforceable.

This is hardly surprising. Courts hold arbitration agreements unconscionable not because they require the worker or consumer to arbitrate their claims, but because they make it impossible to do so. Corporate drafters of such agreements require the individual's claims be submitted to arbitration, but attach such onerous conditions to the arbitration that no rational consumer or employee can vindicate his or her rights there. Such conditions include prohibitively high fees, requiring the arbitration be conducted in a distant location, restrictions on the damages that the individual can recover, drastically shortened limitations periods, and prohibitions against aggregating small claims into a class arbitration.

These provisions were held unconscionable precisely because they prevented the worker or consumer from utilizing arbitration. If the unconscionability decision were the responsibility of

the arbitrator, that decision would not be made: The unconscionable feature of the agreement is one that prevents the individual from going to arbitration. Petitioner's proposal is essentially a Maytag repairman scenario: The arbitrator may be the designated decider, but no one is going to call.

Petitioner's plan is unworkable even if it is assumed that some unconscionability challenges are placed before the arbitrator. The arbitrator would be placed in an untenable position of conflict of interest. The arbitrator would face a choice of whether to proceed with the arbitration despite its unconscionable features or rule the agreement unenforceable and thereby deprive himself of substantial arbitration fees.

It is a fundamental principle, which this Court has repeatedly upheld, that due process guarantees a neutral decisionmaker and does not permit a judge to decide a case in which he or she has a direct, personal, substantial pecuniary interest. Petitioner's proposal blatantly offends this principle. The financial interest of the arbitrator will always be aligned with the drafter of the arbitration agreement and against the interest of the individual, the victim of the unconscionable contract.

To reject this role for arbitrators is no indicator of hostility toward arbitration. Historically, the law has not even inquired as to whether a judge with financial interest in a case harbored actual bias. Even assuming such a decisionmaker were fully capable of ignoring his or her own financial stake in the matter, the law does not permit a self-interested decisionmaker. This Court should reject such a flawed proposal and maintain the role of the neutral

and disinterested judge as the decisionmaker on the question of whether an arbitration agreement is unconscionable.

ARGUMENT

I. THE UNCONSCIONABILITY DOCTRINE SUPPORTS THE ENFORCEMENT OF CONTRACT RIGHTS BY ALLOWING COURTS TO REFUSE ENFORCEMENT OF EGREGIOUSLY UNJUST CONTRACTUAL PROVISIONS OBTAINED BY PARTIES WIELDING GREAT ECONOMIC POWER.

This case highlights the important role courts have played in preserving freedom of contract which is so important to this country's economic vitality. The doctrine of unconscionability is neither recent nor hostile to the private right of contract. Common law courts have employed this equitable doctrine throughout this country's history as an important tool in preserving the sanctity of contract rights. Courts' identification of and refusal to enforce unconscionable arbitration provisions fosters fairer and more readily accepted arbitration practices.

A. The Law Does Not Guarantee Enforcement of Contracts "As Written," But Has Historically Provided Courts a Safety Valve to Deny Enforcement of Unjust and Unconscionable Provisions.

The cornerstone of Petitioner's case is that arbitration agreements must be "enforced as written." Pet'r Br. 14. This, Petitioner asserts, is "the

central purpose of the FAA." *Id.* at 17 & 21. Indeed, the only role Petitioner sees for the federal courts is "guaranteeing the enforcement of private contractual arrangements," such as the arbitration agreement in this case, without question. *Id.* at 15.

This is not, has never been, and should not become the law.

Professor Samuel Williston wrote in his authoritative treatise on the eve of enactment of the Federal Arbitration Act in an era when freedom of contract was held in the highest esteem:

> When it is now said that courts "will neither make nor modify contracts, nor dispense with their performance," if it is meant that such power will not be exercised except in accordance with legal principles, the statement is sound; but if the meaning is that parties to contracts are always liable in accordance with their terms, it is far too narrow a limitation of the functions of the common law . . . . [C]ourts have wisely imposed obligations on parties to contracts which they never agreed to assume; and . . . have modified contracts or dispensed with their performance, simply because justice required it.

3 Samuel Williston, WILLISTON ON CONTRACTS 3281-82 (1920) (footnotes omitted).[2]

Professor Richard Epstein, in an article widely cited for its call for the enforcement of contracts according to their terms, adds this important qualification:

> [T]he principle of freedom of contract, which was central to the classical common law . . . does not require a court to enforce every contract brought before it. The doctrine of unconscionability . . . can, if wisely applied, allow the courts to . . . improve the general administration of the contract law.

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 315 (1975).

The unconscionability doctrine has deep roots. *See generally* Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 Tul. L. Rev. 193 (1967-68). The law courts at common law, though committed to enforcing contracts as drafted, often "prevented unconscionable

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[2] Professor Arthur Corbin, who collaborated with Williston on the Restatement of Contracts but with whom he often held diametrically opposed views, agreed that the law does not and cannot guarantee enforcement of contracts as written. A court will hold the parties to an unwritten implied promise of "good faith," recognizing that "its duty to the spirit of the bargain is higher than its duty to the technicalities of the language." Arthur L. Corbin, CORBIN ON CONTRACTS § 570 (Kaufman Supp. 1984).

results through strict interpretation of unconscionable clauses and manipulation of conventional concepts of contract law." *Id.* at 197. They also employed findings of fraud, duress, and lack of mutual assent as "imaginative flanking devices" to avoid an unjust result. John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS 820 (2d ed. 1977). In fact, "common law courts exercised much discretion in this area." Cellini & Wertz, *supra*, at 198.

These tactics may have achieved just results in particular cases, but were highly unpredictable and harmful to the law's development generally. As Professor Karl Llewellyn remarked in this regard, "[c]overt tools are never reliable tools." Karl N. Llewellyn, THE COMMON LAW TRADITION 365 (1960).

It fell to equity courts to develop the means to address this problem directly. As Chief Justice Stone noted, the concept of unconscionability underlies "practically the whole content of the law of equity." Harlan F. Stone, *Book Review*, 12 Colum. L. Rev. 756, 756 (1912). The doctrine, as developed by the English courts, was readily adopted in this country. *See* Restatement (Second) of Contracts § 208, comment b (1981).

Section 2-302 of the Uniform Commercial Code incorporated the doctrine of unconscionability into the law of sales. Professor Llewellyn, the U.C.C.'s primary author, viewed the doctrine as "a safety valve" that allowed courts "to make the entire system more predictable." Curtis Nyquist, *Llewellyn's Code As a Reflection of Legal Consciousness*, 40 New Eng. L. Rev. 419, 433 (2006).

The American Law Institute incorporated the U.C.C. formulation of the doctrine into its restatement of general contract law:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Restatement (Second) of Contracts § 208.

It thus became widely accepted as a general principle, that, as one state court declared, unconscionability serves an important function as a "safety valve in our law of contracts," allowing courts "'to refuse enforcement of a contract . . . when such enforcement would not be in keeping with the basic function of any court—the administration of justice.'" *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982), quoting John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1, 2 (1969). *See also* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609, 609 (2009) (Unconscionability also acts as a "safety valve" by calling attention "to the presence of social evils requiring action.").[3]

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[3] In addition, and not insignificantly, allowing courts to refuse enforcement of egregiously unfair arbitration clauses operates "as a sort of safety valve that makes arbitration

Congress did not depart from this general principle when it enacted the Federal Arbitration Act, but instead explicitly made state unconscionability law applicable to agreements to arbitrate:

> [A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added).

Essentially, section 2 serves as an equal protection guarantee for arbitration agreements by placing them "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). They are subject to general state law contract defenses, including "claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). In short, Congress intended "to make arbitration

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politically sustainable," providing "an outlet to relieve pressure on the system and avert the truly intolerable outcomes that might provoke legislative action." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1488 (2008).

agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Consequently, this Court has made clear, "generally applicable contract defenses, such as fraud, duress, *or unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). (emphasis added).

B. Widespread Use of Standard Form Contracts Makes Judicial Review for Unconscionability Even More Essential.

Petitioner strives mightily to uphold the pretense that the contract in this case was a negotiated agreement and ought to be enforceable as such. "[H]aving made the bargain to arbitrate," Petitioner insists, "the party should be held to it." Pet'r Br. 17, borrowing a phrase this Court used in *Mitsubishi Motors*, 473 U.S. at 628, where the parties were substantial commercial enterprises who undoubtedly did negotiate their contractual rights.

This is most assuredly not the case for most consumers and employees. Overwhelmingly, they are presented with standardized form contracts. The corporate entity whose legal department drafted the document does not expect the consumer or employee to read it or to understand its import. It certainly does not allow negotiation or alteration. The weaker party's only option is to reject the entire transaction and take his or her business to another corporation

whose paperwork is similarly one-sided.[4] As portrayed in one widely-quoted description:

> The consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated.

Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1229 (1983).

Standardized agreements are nevertheless generally enforced, regardless of whether either party knew or understood their contents. Restatement (Second) of Contracts § 211(2). The law recognizes that such agreements are "essential to a system of mass production and distribution." *Id.*, comment a. Thus, "a party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read" it. *Id.*, comment b.

Despite their advantages, the general law of contracts recognizes that such one-sided contracts present an "obvious danger of overreaching" and are therefore subject "to the power of the court to refuse to enforce an unconscionable contract or term." *Id.*,

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[4] *Amicus* Equal Employment Advisory Council ("EEAC") does not even attempt to disguise the lack of any real bargaining power for employees or consumers: "Like any prospective party to a contract, Respondent could have voted with his feet." EEAC Br 17.

comment c. *See also* Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 Wash. U. L.Q. 289, 312-13 (1997) ("Unconscionability is a safety valve that guards against outrageous terms" in standard form contracts).

This Court as well has recognized the importance of the doctrine of unconscionability in this context, holding that arbitration provisions in adhesive contracts may be enforced against consumers precisely because section 2 "gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision" under general contract law principles. *Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Thus, neither the FAA nor the law of contracts generally entitles a party to enforcement of a standardized contract as written, no matter how unfair its terms. The "intent of the parties" expressed in the writing, though a legal fiction, is enforceable so long as the drafting party has not abused that position by inserting provisions that violate the policy of basic fairness that underlies contract law. As Justice O'Connor explained,

> Our legal system has decided to allow private parties to invoke the coercive power of the State in the effort to enforce those (and only those) private agreements that conform to rules set by those state policies known collectively as "contract law." Courts cannot enforce private agreements without reference to those policies, because those policies

> define the role of courts in deciding disputes concerning private agreements.

American Airlines, Inc. v. Wolens, 513 U.S. 219, 250 (1995) (O'Connor, J., dissenting in part).

In short, if section 2 of the FAA acts as an equal protection guarantee for those who insist upon drafting arbitration agreements in consumer and employment contracts, then the doctrine of unconscionability, as applied by the courts, serves as a guarantee of due process for the consumers and employees who must accept such provisions.

In this case, this Court is asked whether courts shall continue to play that role. Petitioner contends that corporate draftsmen can deprive the courts of any authority to do so simply by inserting the words used by Rent-A-Center in this case into any standardized, unread arbitration "agreement."

C. This Court Has Properly Assigned the Question Whether an Arbitration Agreement Is Unconscionable to Judicial Determination.

Amici agree with Respondent that such a ruling would be inconsistent with the FAA and with the precedents of this Court. As Petitioner concedes, "gateway" questions of arbitrability "would normally be decided by the court." Pet'r Br. 21. Petitioner insists, however, that this Court in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), created an exception whereby the party drafting the contract

can strip the court of any authority to decide unconscionability in favor of the arbitrator simply by inserting language indicating that "the parties clearly and unmistakably [so] provide." Pet'r Br. 23.

No such "exception" can be derived from a fair reading of those two cases. Neither case involved unconscionability, but rather "arbitrability." And while arbitrability can be used to refer to whether an arbitration agreement is enforceable under state law, the Court in these two cases made clear it was using the term in a narrower sense—a determination regarding the scope and interpretation of the contract at issue.

In *AT&T* the Court defined "question of arbitrability" as "whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance." 475 U.S. at 649. In *First Options* the Court stated that the arbitrator is to decide arbitrability if there is "clear and unmistakable" evidence that the parties so agreed. But the Court made clear in the next sentence that "arbitrability" meant "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement." 514 U.S. at 944-45. In each instance, the Court merely restated its long-held view that questions of contract interpretation are questions that "[a]rbitrators are well suited to answer." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003).

Unconscionability, by contrast, is not a question resolved by interpreting the agreement, but rather by applying the principles embedded in the state's general law of contracts. This Court has explicitly stated that such questions of law—

"whether legal constraints external to the parties' agreement foreclosed the arbitration of [a party's] claims"—are for the court to decide. *Mitsubishi Motors*, 473 U.S. at 628.

Secondly, a challenge to the enforceability of a contract due to procedural and substantive unconscionability can—and very often is—viewed as an assertion that the consumer or worker should not be deemed to have agreed to the provision at all.

Petitioner appears to concede that an allegation of fraud in the making of an arbitration agreement is always a question for the Court. Pet'r Br. 25, citing *Prima Paint Corp. See also Mitsubishi Motors*, at 626 ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.").

Petitioner, however, would apply a different rule to an allegation of unconscionability: Whether the parties made an agreement must be decided by the court; whether an agreement is valid and enforceable may be assigned to the arbitrator. Pet'r Br. 25-26 n.9.

This distinction between lack of intent and lack of fairness is a false dichotomy. It stems from a false view of unconscionability as a matter of courts assuming "the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable." Chamber Br. 14.

In fact, a finding that a provision buried in a standard contract, presented to the inexpert

consumer or employee on a take-it-or-leave-it basis is procedurally and substantively unconscionable is essentially a finding that the consumer or employee did not agree to the provision. Rather than demand the weaker party bear the burden of proving lack of assent, the court can make its decision based on the contract language, construed against the drafter, and the surrounding circumstances.

Professor Epstein, no strong supporter of the doctrine, explains: "The doctrine of unconscionability, properly conceived and applied, . . . protects against fraud, duress and incompetence, without demanding specific proof of any of them," looking instead to the content of the contract and the positions of the parties. Epstein, *Unconscionability, supra*, at 302.

As Justice O'Connor has pointed out, "the unconscionability doctrine [is] far from being a purely 'policy-oriented' doctrine that courts impose over the will of the parties." *American Airlines*, 513 U.S. at 249. Rather, "a determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract." *Id.*

A recent example can be found in the New York Court of Appeals decision in *Schreiber v. K-Sea Transportation Corp.*, 879 N.E.2d 733 (N.Y. 2007). A shipowner sought to compel arbitration of an injured seaman's Jones Act claim. The American Arbitration Association ("AAA") filing fee was $10,000 of which the seaman's share under the arbitration agreement was $9,250. The Court of Appeal stated that the fee was "so far in excess of what most seamen can afford [that] a factfinder might conclude that K-Sea

deceived Schreiber into signing." *Id.*, 879 N.E.2d at 739.

In sum, this Court has created no exception to the rule that gateway decisions that are matters of contract law, as distinguished from contract interpretation, are judicial decisions. Nor is any such exception warranted. Decisions regarding unconscionability largely overlap with decisions regarding lack of intent to contract, which are indisputably judicial decisions.

II. ALLOWING THE PARTIES TO ASSIGN THE DETERMINATION OF WHETHER AN ARBITRATION PROVISION IS UNCONSCIONABLE IS UNWORKABLE.

Not only is the regime proposed by Petitioner at odds with section 2 of the FAA and with the precedents of this Court, it is also entirely unworkable. This is not an instance where the party retains substantive rights and "only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors*, 473 U.S. at 628. Unconscionable arbitration agreements often shut the individual out of both the courthouse and the arbitrator's office. Any right to have unconscionability be decided by the arbitrator is illusory.

A. Unconscionable Arbitration Provisions Frequently Discourage or Prevent the Weaker Party from Proceeding to Arbitration.

Petitioner urges this Court to hold that the party drafting an arbitration agreement can strip the court of authority to review the agreement for unconscionability and instead confer that authority on the arbitrator.

Petitioner is confident that arbitrators are "fully capable" of fairly deciding whether an arbitration agreement is unconscionable. Pet'r Br. 34. In Petitioner's view, such "garden variety" unconscionability claims are easily decided by courts, and "[t]here is no reason why an arbitrator could not do likewise." *Id.* at 35. Yet, Petitioner cannot point to a single instance in which an arbitrator has done so. Nor has any of Petitioner's supporting *amici* identified a single instance where an arbitrator has ruled that an agreement to arbitrate is unenforceable as unconscionable.[5]

This is not at all surprising. Arbitrators' capability to make unconscionability decisions is a moot point if individuals cannot go to arbitration precisely because of the unconscionable features of

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[5] The Chamber of Commerce found 61 Westlaw-reported decisions involving unconscionability challenges to arbitration agreements over five years, 25 of which succeeded. Chamber Br. 17-18 nn.6 & 8 According to the Chamber, "millions of contracts" designate the arbitrator as the decider of questions of enforceability Chamber Br. 10. The Chamber does not indicate that a single arbitrator has resolved that question in favor of the employee or consumer.

their arbitration agreements. Many arbitration agreements are held unconscionable because they are designed to make it difficult—if not economically irrational—for individuals to pursue their claims at all. The aim of the drafter of the agreement is not to move disputes from the judicial to the arbitral forum, but rather to give the drafter immunity from accountability in any forum. It does so by making arbitration so expensive, onerous or of such limited benefit that no rational person would pursue it. As one federal district judge stated:

> It is not just that AT&T wants to litigate in the forum of its choice—arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable.

Ting v. AT&T, 182 F. Supp. 2d 902, 939 (N.D. Cal. 2002), *aff'd in part* 319 F.3d 1126 (9th Cir.), *cert. denied* 540 U.S. 811 (2003).

Judicial review of such unconscionable arbitration provisions is not indicative of hostility toward arbitration. Rather, the court seeks to protect access to the arbitral forum by inquiring,

> whether the arbitration regime here is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. . . . [I]f the remedy is truly illusory, a court should not order arbitration at all but decide the entire dispute itself.

Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 13 (1st Cir. 2009).

The "right" to have an arbitrator determine whether an arbitration agreement is unconscionable is a hollow right indeed if the provision is unconscionable precisely because it prevents the party from going to arbitration. Corporations seeking to insulate themselves from liability to their customers or employees have drafted mandatory arbitration "agreements" in a variety of ways that render arbitration a "truly illusory" remedy.

1. High Arbitration Costs

This Court has observed that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

A typical arbitration requires an up-front payment from the parties of a filing fee to a designated arbitration provider, such as the AAA, which was named in the Rent-a-Center agreement here. Those fees can be substantial, even prohibitive for individuals with modest claims. For example, in one case, a plaintiff pursuing an employment discrimination claim "was required to pay an initial, non-refundable filing fee of $500 to the American Arbitration Association, an additional filing fee of $2,750, a case-filing fee of $1,000, an additional charge of $150 for each day of the hearing and half the cost of an arbitrator." *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003).

In *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002), plaintiff alleged that a jewelry retailer fraudulently added the cost of life and property insurance to the amount charged for jewelry purchases. The store sought to enforce an arbitration agreement making the customer responsible for "a $500 minimum, non-refundable administrative fee; a $150 daily hearing fee; a $150 daily room rental fee; . . . processing fees, reporting service fees, and possible postponement fees." *Id.* at 282. *See also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (requirement that mobile home purchaser pay filing fee of $2,000, plus share of arbitrators' fees, to resolve $1,500 claim was unconscionable); *Phillips v. Associates Home Equity Serv., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) ($4,000 filing fee for arbitration of plaintiff's Truth in Lending Act claim "would effectively preclude her from vindicating her federal statutory rights.").

In addition to the filing fee, the parties are responsible for compensating the individual arbitrator hearing the case. Arbitrators require payment in advance, and rates of $1,800 per day or more are not unusual. *See, e.g.*, *Spinetti*, 324 F.3d at 217 ("a mid-range arbitrator in Western Pennsylvania charges approximately $250 an hour with a $2,000-per-day minimum"); *Phillips*, 179 F. Supp. 2d at 846 (arbitrators in the Chicago area are compensated up to $5,000 per day with an average of $1,800 per day); *Ting*, 182 F. Supp. 2d at 917 (noting that AAA arbitrators on the Commercial Panel in Northern California were paid an average of $1,899 per day, with some arbitrators charging almost double that amount); Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in*

the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 410 n.189 (1996) (reporting that JAMS/Endispute arbitrators charged, at that time, an average of $400 per hour).[6] These charges apply not only to hearing time, but to time expended on motions and discovery rulings, "study time," and travel time. *See Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 897, 894 (W.D. Va. 2001).

Perhaps most importantly, the actual cost of going to arbitration is unknown to the consumer or employee at the outset. He or she is required to pay a share of the arbitrator costs in advance as the arbitration progresses. This has a chilling effect on the individual's ability to vindicate important legal rights.

The arbitrators' fees typically come to a much larger total than the filing fees. The First Circuit recently noted that some arbitrations of franchise disputes have reportedly cost $100,000 and $150,000 (for one arbitrator) and $300,000 and $400,000 (for a three-person arbitration panel). *Awuah*, 554 F.3d at 12.

Fees are less for smaller and simpler claims, but may still be set at a level that discourages most persons with modest but valid claims. One court, for example, estimated the arbitrators' fees in a typical employment discrimination case to be $3,750 to

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[6] It has been estimated that a typical employment discrimination case averages between fifteen to forty hours of arbitrator time *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 n.5 (10th Cir. 1999).

$14,000. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997).

The inescapable conclusion is that the drafters of such provisions are not seeking an inexpensive forum; their aim is to make arbitration too expensive for consumers and employees to use. As one court noted in a case where a borrower against whom a claim has been brought could obtain a hearing only upon prepayment of a minimum $98 filing fee and $750 arbitrator fee, given the relatively small amounts at issue, "the procedure seems designed to discourage borrowers from responding at all." *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (Cal. Ct. App. 1993). That is certainly the only conclusion that can be drawn from an arbitration process that leaves a victorious consumer worse off than one who simply stays home. *See, e.g.*, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) ($2,000 non-refundable registration fee to arbitrate personal computer claims generally valued at less than $1,000 held unconscionable); *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 860 (Mo. 2006) (where homebuyers made claims for misrepresentation and defective workmanship, arbitration provision that required purchasers to pay all arbitration fees was unconscionable; "the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress."

In *Gilmer v. Interstate/Johnson Levine Corp.*, this Court held that agreements requiring arbitration of employment claims are enforceable under the FAA, based on the assumption that a person does not forgo any substantive rights

provided by the statute; they are simply resolved in an alternate forum. 500 U.S. at 26.

As the Tenth Circuit pointed out, "This supposition, falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights." *Shankle*, 163 F.3d at 1234. An arbitration agreement "that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum." *Id.* Prohibitive costs, as the Idaho Supreme Court has pointed out, "turns the purposes of arbitration upside down. It is an expensive alternative to litigation that precludes the [weaker party] from pursuing the claim." *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003).

The consumer or employee faced with unaffordably large arbitration costs would be prevented by those same costs from seeking a hearing and decision by the arbitrator on the question of unconscionability.

2. Distant forum

Another device used to discourage individuals from invoking their arbitral rights is to require that the arbitration take place in a distant location.

For example, in *Bolter v. Superior Court (Harris Research, Inc., r/p/i)*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001), where defendant Harris was a large international corporation and plaintiffs were small "Mom and Pop" franchisees located in California, the court held unconscionable an

arbitration clause that required arbitration in Utah. The court pointed out that the provision "requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and . . . [hire] counsel familiar with Utah law. *Id.* at 909. The court suggested that "Harris understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive." *Id.* at 910.

Similar decisions finding unconscionable a requirement that the individual travel to a distant arbitral forum include: *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (*en banc*) (requirement that individual travel from California to Boston to arbitrate); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007) (requirement that Pennsylvania consumer's claim be arbitrated in California was "yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes"); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001) (requirement that consumer who had purchased used car in Virginia travel to Los Angeles for arbitration unconscionably "effectively eliminates any remedy for consumers."); *Casarotto v. Lombardi*, 901 P.2d 596, 597 (Mont. 1995), *rev'd on other grounds sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (franchise agreement required Montana residents to arbitrate in Connecticut).

3. Limitations on remedies

Companies can also preclude their customers or employees pursuing their arbitration rights by drafting provisions which so limit remedies that even a successful arbitration outcome does not outweigh the cost of pursuing the claim. For example, in *O'Donoghue v. Smythe, Cramer Co.*, No. 80453, 2002 WL 1454074, at *5 (Ohio Ct. App. July 3, 2002), homebuyers alleged that defendant inspector failed to disclose latent defects. The court held the arbitration agreement unconscionable and unenforceable where the arbitration fee was at least $500, but the agreement limited recoverable damages to $265.

Some arbitration agreements prohibit the arbitrator from awarding punitive damages. Although punitive damages may not be unlimited in amount, this Court has recognized that in some circumstances where provable compensatory damages are small, "punitive damages may be the only significant remedy available." *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980).

This is also the case in the arbitral forum. For example, the consumer who has been defrauded of a relatively small amount and who is limited to recovering only that amount has no incentive to undertake the effort and expense of arbitrating her claim. In *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999), where a cellular telephone customer alleged that defendant overcharged for long distance service, the court held the company's arbitration provision unconscionable. "The arbitration clause expressly limits Powertel's liability to actual damages, thereby precluding the

possibility that Powertel will ever be exposed to punitive damages, no matter how outrageous its conduct might be." *Id.* at 576. *See also Bellsouth Mobility, LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002) (same).

The unconscionable aspect of such limits on recoverable damages is not that they reduce recoveries in arbitration, but that they preclude individuals from arbitrating their claims at all.

4. Limited Discovery

The arbitration agreement drafted by Rent-A-Center provides that, "Each party shall have the right to take the deposition of one individual and any expert witness designated by another party." As the California Court of Appeal recently stated, such a limitation may appear even-handed, but in reality tips the scales dramatically in favor of the defendant in employment cases.

> This is because the employer already has in its possession many of the documents relevant to an employment discrimination case as well as having in its employ many of the relevant witnesses. . . . [These limits on discovery] work to curtail the employee's ability to substantiate any claim against [the employer].

Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 486-87 (Cal. Ct. App.), *rev. denied*, No. A114848, 2008 Cal LEXIS 12259 (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 1048 (2009) (internal quotes and citations omitted). *See also Hamerick v. Aqua*

Glass, Inc., 2008 WL 2853881, at *3 (D. Or. 2008) (arbitration limiting each side to one deposition was impermissibly one-sided in favor of the employer); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538 (E.D. Pa. 2006) (same); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (same).

5. Short Limitations Periods

Prescribing an unreasonably short period within which an arbitration claim must be filed is another device used to prevent individuals, particularly employees with discrimination claims, from utilizing arbitration. For example, the Third Circuit in *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003), found that a contract requirement that employee alleging discrimination file an arbitration claim within 30 days of the event was unconscionable. *See also Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 307 (Cal. Ct. App. 2004) (provision that required employee claims, ordinarily governed by four-year statute of limitations, be filed within 180 days unconscionable).

6. Class Action Waivers

Class actions represent an efficient means of adjudicating numerous similar claims that may involve important legal rights but do not result in sufficient monetary awards to warrant their individual adjudication. As this Court has stated, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 617 (1997) (internal quotation omitted). *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount").

The same holds true in the arbitral forum where claims of modest amount cannot realistically be adjudicated unless they can be aggregated with a sufficient number of other similar claims to justify the expense of arbitration. Realizing this, corporations anticipating the possibility of many small-amount consumer claims have drafted arbitration provisions that require consumers to arbitrate their claims one at a time and waive any right to aggregate claims or join in a class. The result is not a flood of small individual arbitrations. Instead, the result is that no claims are brought and the company has succeeded in insulating itself from any accountability. For example in *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007), where a cable operator allegedly levied $600,000 in fraudulent charges, at ten dollars per subscriber, the Eleventh Circuit held the arbitration provision's prohibition on class actions unconscionable:

> Without the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast . . . The cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, is too great. . . . This will allow Comcast to engage in unchecked market behavior that may be unlawful. Corporations should not be permitted to use class action waivers as a means to

> exculpate themselves from liability for small-value claims.

Id. at 1224. The First Circuit held the same type of provision unenforceable in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), stating, "Comcast [would] be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law." *Id.* at 61.

Other courts have held such arbitration provisions unconscionable under similar reasoning. *See, e.g., Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (class action waiver in credit card agreement held unconscionable); *Fensterstock v. Educ. Fin. Partners*, 618 F. Supp. 2d 276 (S.D.N.Y. 2009) (class action waiver in student loan agreement held unconscionable); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. Super. Ct. 2005) (class-arbitration waiver in consumer credit contract held unconscionable); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (holding that a class arbitration waiver in a phone service contract held unconscionable).

* * *

The salient feature of these provisions held unconscionable by federal and state courts is not any judicial hostility toward arbitration or suspicion that the consumer or employee will be treated unfairly in the arbitral forum. In each instance, the arbitration provision was ruled unconscionable because the provision *itself* was hostile to arbitration. These are provisions that were designed to keep individuals out of the arbitral forum by placing difficult or impossible barriers in their way.

To propose that arbitrators rather than courts make such determinations is, essentially, to offer a Maytag repairman scenario: He may be the designated decider of arbitrability, but no one is likely to call.

B. Arbitrators Who Are Presented With Unconscionability Challenges Will Be Placed in an Untenable Position of Conflict of Interest.

Even if an individual proceeds to arbitration and moves the arbitrator to decide whether the arbitration agreement is unconscionable, Petitioner's plan remains unworkable. The arbitrator in that circumstance is faced with the choice of whether to proceed with the arbitration despite its unconscionable features or rule that the arbitration agreement is unenforceable, thereby depriving himself of thousands of dollars in fees.[7]

A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* As the Chief Justice had occasion recently to point out, "It is well established that a judge may not preside over a case

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[7] This actually greatly underestimates the financial stakes for the arbitrator. The individual is not likely to be in arbitration on a regular basis, but the corporate party is often a "repeat player." An arbitrator's ruling that the corporation's arbitration contract is unconscionable will likely mark the last occasion that arbitrator is permitted to handle an arbitration involving that party.

in which he has a 'direct, personal, substantial pecuniary interest.'" *Caperton v. A.T. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2263, 2252 (2009) (Roberts, C.J., dissenting), quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

This principle applies no less to arbitrators. Section 10 of the FAA, which authorizes a court to vacate an award due to "evident partiality" of the arbitrator, demonstrates "a desire of Congress to provide not merely for any arbitration but for an impartial one." *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147 (1968).

The compromised position of the arbitrator was a point of concern to Justice Black in his dissent in *Prima Paint Corp. v. Flood & Conklikn Manufacturing Co.*, which allowed the arbitrator to resolve a claim of claim of fraud in the inducement for the entire contract:

> The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation.

388 U.S. at 416 (Black, J., dissenting).

This Court has repeatedly made clear that "due process requires a 'neutral and detached judge

in the first instance.'" *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993), quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972). This command "is no different when a legislature delegates adjudicative functions to a private party." *Concrete Pipe*, 508 U.S. at 617. "Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." *Ward*, at 61. "These essential constitutional promises," this Court stated, citing *Concrete Pipe* and *Ward*, "may not be eroded." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

The stringent rule against adjudicatory systems in which the trier has a financial interest in its own decision stretches back 400 years to a decision in *Bonham's Case*, 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), in which the defendant was fined by the President and Censors of the Royal College of Physicians for practicing medicine without a proper license. Half the fine was given to the Royal College. Presiding judge Sir Edward Coke famously held the proceeding fundamentally unfair.

This Court has rigorously applied that principle, "demonstrating the powerful and independent constitutional interest in fair adjudicative procedure." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). In *Tumey v. Ohio*, 273 U.S. 510 (1927), the village mayor was authorized to try defendants accused of illegally trafficking in liquor and was paid half the fine imposed if the defendant was convicted. The mayor received nothing if the defendant was acquitted. *Id* at 523. This Court held the trial violated due process. The Court cited

Bonham's Case for the general rule at common law "that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable." *Id.* at 524.

The test this Court has consistently applied is that due process does not permit the adjudicator to hold a financial interest in the outcome of his decision that "would offer a possible temptation to the average . . . judge . . . which might lead him not to hold the balance nice, clear and true." *Ward*, at 60, quoting *Tumey*, at 532. Placing the responsibility for making unconscionability decisions on arbitrators does not pass this test.

Petitioner does not even attempt to deny the obvious flaw in its proposal to have the decision to enforce arbitration agreements be made by those who get paid only when arbitration agreements are enforced. Rather, Petitioner dismisses this fundamental objection "because taken to its logical conclusion arbitrators then would be mistrusted when it comes to deciding any dispositive motion." Pet'r Br. 35.

Of course, in any particular case, the movant of a dispositive motion might be the corporate drafting party to the contract or it might be the individual. If the case presents circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Caperton*, 129 S. Ct. at 2259, then the arbitrator's decision may well be "mistrusted."

But the question before this Court is broader. Petitioner asks this Court to give its approval to a decisionmaking regime in which the movant challenging the arbitration agreement as unconscionable will always be the weaker party and the financial self-interest of the arbitrator will always lie with the stronger party, who drafted the arbitration agreement and seeks to enforce its terms. There is nothing to recommend taking this decision out of the hands of neutral and disinterested courts.

It is not hostility toward arbitration that counsels against placing arbitrators in a position where financial self-interest is an obvious temptation. Petitioner's proposal is unsound even if all arbitrators were assumed to be able to put aside all thoughts of earning substantial fees and to decide unconscionability claims on their merits. This Court has long insisted that "justice must satisfy the appearance of justice," and a presumption of bias attaches, even if this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136.

As this Court explained in *Tumey*:

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.

273 U.S. at 532.

This presumption of bias on the part of financially interested judges has its roots in Sir Edward Coke's declaration in *Bonham's Case* that no man shall be judge in his own cause. 77 Eng. Rep. at 652. Indeed, as Judge Kozinski has remarked, the rule of presumed bias "may indeed be the single *oldest* rule in the history of judicial review." *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998).

CONCLUSION

For the foregoing reasons, the circuit court's decision vacating the district court's order compelling arbitration should be affirmed.

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AMICUS CURIAE BRIEF

No. 09-497

IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT.

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] The instant case presents an important question concerning the judicial enforcement of arbitration agreements. The collective bargaining agreements negotiated by affiliates of the AFL-CIO typically provide for the resolution of contract

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

disputes by arbitration. The AFL-CIO has, therefore, often filed briefs in cases before this Court concerning the enforcement of arbitration agreements. *See, e.g.*, *Granite Rock Co. v. Int'l Broth. of Teamsters*, No. 08-1214 (U.S. argued Jan. 19, 2010).

STATEMENT

Antonio Jackson and Rent-A-Center West, Inc. are parties to an agreement for arbitration of all disputes arising out of Jackson's employment relationship with Rent-A-Center. Pet. App. 2a. Rent-A-Center petitioned to compel arbitration of an employment discrimination claim Jackson had brought to court, and Jackson opposed the petition on the ground that "the arbitration agreement in question is clearly unenforceable in that it is unconscionable." JA 40. Rent-A-Center responded that the unconscionability issue raised by Jackson's opposition to arbitration was solely a matter for the arbitrator to decide under the following provision in the arbitration agreement:

> "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." Pet. App. 9a.

The district court "found that the Agreement to Arbitrate 'clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable.'" Pet. App. 9a. On this basis, the district court "held that 'the question of arbitrability[i.e., the question of unconscionability raised by Jackson] is for the arbitrator'" and issued an order directing arbitration. *Ibid.*

The court of appeals vacated the order directing arbitration and remanded the case to the district court to consider Jackson's challenge to the legal enforceability of the arbitration agreement. Pet. App. 20a. In this regard, the court of appeals ruled that even "where . . . an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter." Pet. App. 18a.

SUMMARY OF ARGUMENT

As a precondition to "mak[ing] an order directing the parties to proceed to arbitration," § 4 of the Federal Arbitration Act requires that a court must first "be[] satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. If there is such an issue, the court may order arbitration only after "find[ing] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder." *Ibid.* The FAA § 4 requirement that the court "find that an agreement for arbitration was made" entails a requirement to determine whether a *legally enforceable* agreement was made. The standards for determining whether an arbitration agreement is legally enforceable under the FAA are set forth in § 2 of the Act. Section 2 provides that arbitration agreements "involving commerce" are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, whenever a party opposing arbitration places "the making of the arbitration agreement . . . in issue," *id.* § 4, by raising "grounds . . . for the revocation of [such] contract," *id.* § 2, the court must determine whether or not the respondent has raised a viable ground for revocation as a precondition for ordering arbitration.

In the instant case, the party resisting arbitration asserted that the arbitration agreement is legally unenforceable on grounds of unconscionability. The arbitration agreement in question provides the arbitrator with authority to decide challenges to the agreement's enforceability. Taking account of this provision in the arbitration agreement, the court of appeals held that "where . . . an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter." Pet. App. 18a. Accordingly, the court of appeals remanded the case to the district court to make this determination.

The ruling of the court of appeals gives full effect to the provision in the arbitration agreement giving arbitrators the authority to resolve disputes over the agreement's enforceability. At the same time, that ruling is faithful to the requirements of the Federal Arbitration Act. The only question presented here is whether the court of appeals erred in directing the district court to determine the enforceability of the arbitration agreement, taking into account the provision making enforcement itself an arbitrable issue. That ruling of the court of appeals is correct and should be affirmed.

ARGUMENT

The sole question presented by the petition for certiorari is:

> "Whether a district court or an arbitrator should decide claims that an arbitration agreement under the Federal Arbitration Act is unconscionable, when the parties to the agreement have clearly and unmistakably assigned this 'gateway' issue to the arbitrator for decision." Pet. Br. i.

The court of appeals answered this question as follows:

> "[W]here . . . an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability[,i.e., to arbitrate issues concerning the legal enforceability of the arbitration agreement] is itself enforceable is nonetheless for the court to decide as a threshold matter." Pet. App. 18a.

The court of appeals' ruling is entirely correct. As we show in point I below, that ruling is dictated by the requirements expressly stated in § 4 of the Federal Arbitration Act for a court to grant a petition for an order directing arbitration. In point II below, we show that the court of appeals' ruling takes proper account of the arbitration agreement's provision giving the arbitrator authority to resolve arbitrability disputes and does so in the manner indicated by this Court's FAA precedents.

I. Section 4 of the Federal Arbitration Act Requires a Court to Determine Any Issues Regarding the Legal Enforceability of an Arbitration Agreement Before Directing Arbitration.

A. Section 4 of the Federal Arbitration Act sets out the procedure for petitioning for an order directing arbitration and the issues the court must decide in determining whether or not to issue such an order. Under FAA § 4, to initiate such a proceeding, "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition" any district court having jurisdiction "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

The court, in assessing such a petition and as a precondition to "mak[ing] an order directing the parties to pro-

ceed to arbitration," must first "be[] satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. If the court finds that "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same [is] in issue, the court [must] proceed summarily to the trial thereof." *Ibid.* If the court then "find[s] that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder," the court "shall . . . dismiss[]" the proceeding. *Ibid.* On the other hand, if the court "find[s] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." *Ibid.*

In other words, FAA § 4 mandates that a court faced with a petition for an order directing arbitration must make two determinations as a precondition to issuing such an order: first, that the arbitration agreement the court is asked to enforce is a legally enforceable contract; second, that one of the parties has breached that contract by refusing to arbitrate a particular matter covered by the agreement.

As this Court has recognized, the FAA § 4 determination of whether an "agreement for arbitration was made" is, in essence, a determination of whether the parties' agreement is one that is *legally enforceable* under the FAA. In this regard, the FAA does not empower the courts to enforce agreements for arbitration that do not involve "maritime transaction[s]" or other "transaction[s] involving commerce." 9 U.S.C. § 2. *See id.* § 1 (defining "maritime transactions" and "commerce" and stating "exceptions to [the FAA's] operation"). Similarly, FAA § 4 does not empower the courts to enforce agreements for arbitration that are legally unenforceable on such

grounds as "fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Thus, as this Court has observed, "[u]nder § 4, . . . [a] claim [of] fraud in the inducement of the arbitration clause itself [would be] an issue which goes to the 'making' of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

FAA § 4's two requirements follow directly from the basic principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). An FAA § 4 order directing arbitration is an order that enforces a contract. And, as a matter of basic contract law, before a court can enter an order enforcing a contract, the court must determine that the contract is legally enforceable and that the requested order remedies a breach of the contract. *See Restatement (Second) of Contracts* § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."). As this Court succinctly put the matter, "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964).

B Section 4 itself does not state the standard for determining whether the parties have made a legally enforceable agreement for arbitration. Rather, it is FAA § 2 that states the standard for determining "the enforceability of arbitration provisions." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Section 2 states the test for what constitutes an "enforceable" arbitration agreement as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Aside from the "commerce" requirement, the substantive requirement for a legally "enforceable" arbitration agreement is that the contract not be subject to revocation "upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.* In other words, whether an arbitration agreement subject to the FAA is legally "enforceable" turns on whether the agreement is subject to "revocation" on grounds that would apply to "any contract."

In sum, "the find[ing] that an agreement for arbitration was made" called for by FAA § 4 as a precondition for "directing the parties to proceed with the arbitration," 9 U.S.C. § 4, is a finding that a "valid, irrevocable, and enforceable" agreement for arbitration was made, *id.* § 2. That being so, a court faced with a petition to enforce an arbitration agreement by issuing an order directing arbitration must, as a precondition to issuing such an order, address and decide any "grounds . . . for the revocation of [that] contract" asserted in opposition to the petition. 9 U.S.C. § 2.[2]

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[2] The FAA does not provide a procedure by which a party may petition for revocation of an arbitration agreement. Thus, the only way to raise the issue of revocation prior to an arbitration award being issued is as a defense to a § 3 petition for a stay of proceedings pending arbitration or to a § 4 petition for an order compelling arbitration. 9 U.S.C. §§ 3 & 4. After an award has been issued, revocation of the underlying agreement can be raised as a defense to a petition to confirm the award or as a ground for vacating the award. 9 U.S.C. §§ 9 & 10.

In responding to Rent-A-Center's petition for an order directing arbitration, Jackson raised an issue concerning "the making of the agreement for arbitration," 9 U.S.C. § 4, by maintaining that "the arbitration agreement in question is clearly unenforceable in that it is unconscionable." JA 40. Unconscionability is one of the "grounds [that] exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. *See, e.g.*, *Restatement (Second) of Contracts* § 208 ("If a contract . . . is unconscionable at the time the contract is made a court may refuse to enforce the contract . . . ."); *Uniform Commercial Code* § 2-302(1) (2004) ("If the court as matter of law finds the contract . . . to have been unconscionable at the time it was made, the court may refuse to enforce the contract . . . ."). Thus, the courts below were required by FAA § 4 to address and decide Jackson's unconscionability defense as a precondition to granting Rent-A-Center's petition for an order directing arbitration.

II. Granting the Arbitrator Authority to Decide Arbitrability Issues Can Affect a Court's Determination Regarding the Legal Enforceability of the Agreement But Does Not Displace the Court's FAA Authority and Responsibility to Make That Determination.

A. Rent-A-Center acknowledges that "[i]nasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide" in ruling on an FAA § 4 petition for an order directing arbitration. Pet. Br. 22. However, the Company maintains that, where the arbitration agreement in question contains "language giving the arbitrator the power to decide issues of contract enforceability, including unconscionability," the court must grant the petition to direct arbitration

without itself addressing "the issue of contract enforceability." Pet. Br. 24.

Rent-A-Center's position is that, because its arbitration agreement with Jackson "contains language consigning the arbitrability question to the arbitrator," the courts below could "consider only that Jackson signed the Agreement" and could not consider any other issue regarding the legal enforceability of that agreement. Pet. App. 15a. Reduced to its essential point, Rent-A-Center's argument is that the parties to an arbitration agreement may contract out of FAA § 4's requirement that a court "find that an agreement for arbitration was made" – in the sense of an agreement that is "valid, irrevocable, and enforceable" under the standards established by FAA § 2 – as a precondition to issuing a § 4 order "directing the parties to proceed with the arbitration." 9 U.S.C. § 4.

This Court recently held that the parties to an arbitration agreement may not contractually alter the standard of review provided in FAA §§ 10 and 11 in proceedings to enforce or vacate arbitration awards under § 9. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The same reasons that led the Court to conclude that the parties to an arbitration agreement may not contractually alter the provisions of FAA §§ 10 & 11 lead to the conclusion that the parties to an arbitration agreement may not contractually alter the provisions of FAA § 4 requiring that a court must find that the arbitration agreement in question is a legally enforceable agreement under the FAA as a precondition to issuing a § 4 order directing arbitration under that agreement.

The *Hall Street* Court noted that "expanding the detailed categories [contained in §§ 10 & 11 for vacating or modifying an award] would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility." 552 U.S. at 587.

The Court found it significant that § 9 provides, "[o]n application for an order confirming the arbitration award, the court 'must grant' the order 'unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.'" *Ibid.* In this regard, the Court observed that "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Ibid.*

The language of § 4 similarly "carries no hint of flexibility." Section 4 provides that "[i]f [there is a] find[ing] that no agreement in writing for arbitration was made . . . the proceeding *shall* be dismissed." 9 U.S.C. § 4 (emphasis added). "There is nothing malleable about ['shall be dismissed'] which unequivocally tells courts," 552 U.S. at 587, on finding that parties have not made a legally enforceable arbitration agreement under the standards set forth in FAA § 2, to dismiss the petition for an order directing arbitration under that agreement.

"Instead of fighting the text," the *Hall Street* Court concluded that "it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review need to maintain arbitration's essential virtue of resolving disputes straightaway." 552 U.S. at 588. In the same way, it makes the best sense to see §§ 2 & 4 as substantiating the FAA's central policy of "plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). FAA § 2 provides that an arbitration contract is subject to revocation on the same "grounds as exist at law or in equity for the revocation of any contract." As a result, whenever a party responds to a petition for an order directing arbitration by advancing a ground, such as duress or unconscionability, for dismissing such a peti-

tion, § 4 requires the court to decide that issue going to the making of a legally enforceable agreement for arbitration in determining whether to grant or dismiss the petition.

Of equal moment, nothing in the text of FAA § 4 or in the law of contracts provides any basis for exempting "agreements to arbitrate arbitrability" from § 4's pre-conditions – judicial determinations that the arbitration agreement in question is a legally enforceable agreement and that the agreement requires the parties to arbitrate the particular matter in question – for a judicial order directing arbitration. For the point of FAA § 4 – and of the law of contracts – is that a judicial order directing an unwilling party to arbitrate a particular matter must be based on a judicial determination that there is a legally enforceable agreement requiring that party to arbitrate that matter. That point applies with equal force to orders directing arbitration under agreements to arbitrate merits disputes and to orders directing arbitration under "agreements to arbitrate arbitrability."

B. As we have just shown, arbitration agreements that confer on the arbitrator the authority to decide arbitrability issues do *not* strip the courts of their FAA § 4 authority and responsibility to determine – as a precondition to issuing an order directing arbitration – whether the arbitration agreement the court is being asked to enforce is legally enforceable and whether the respondent has breached that agreement by refusing to arbitrate a particular matter. That is not to say, however, that conferring such authority on the arbitrator has no effect of a court's FAA § 4 determinations as to the legal enforceability and coverage of the arbitration agreement. To the contrary, contract language conferring such authority on the arbitrator can be highly relevant to the court's legal enforceability and coverage determinations. This Court's opinion

in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), points the way in this regard.

The *First Options* opinion begins its analysis by recognizing that "three types of disagreement" can arise with respect to a dispute arguably covered by an arbitration clause. 514 U.S. at 942. The first type concerns "the *merits* of the dispute," for instance whether substantive term of the contract has been breached or an applicable substantive law has been violated. *Ibid.* (emphasis in original). The second type concerns "the *arbitrability* of the dispute," i.e., whether the merits dispute is subject to arbitration. *Ibid.* (emphasis in original). "Third, [the parties may] disagree about *who should have the primary power to decide the second matter.*" *Ibid.* (emphasis in original).

First Options then goes on to explain that "the answer to the 'who' question," i.e., the question of who decides arbitrability, "is fairly simple." 514 U.S. at 943. That answer derives from the arbitration agreement itself:

> "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration." *Ibid.* (citations omitted; emphasis in original).

Having laid that groundwork, the opinion makes the point – that is critical for present purposes – that as a threshold matter it is the "court [that] should decide whether the parties have agreed to submit the arbitrability issue to arbitration." *Id.* at 944. And, in this regard, *First Options* adds that, "when courts decide whether a party has agreed that arbitrators should decide arbitrability[, they] should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmis-

takabl[e]' evidence that they did so." *Ibid.*, quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986).[3]

Under the analytical framework laid out in *First Options*, contract language giving the arbitrator the authority to decide which merits disputes are arbitrable does *not* negate the court's FAA § 4 authority and responsibility to determine whether the arbitration agreement the court is being asked to enforce covers the particular matter the respondent refuses to arbitrate. But granting the arbitrator that authority does shape the arbitrability issue presented to the court for resolution. In such a case, instead of determining whether the parties have agreed to submit a particular *merits* dispute to arbitration, the court's responsibility is to determine whether the parties have agreed to submit a particular *arbitrability* dispute to arbitration, namely a dispute as to which merits disputes are arbitrable. In so doing, the court is exercising its FAA § 4 authority and responsibility to determine the scope of the arbitration agreement's coverage, but the court makes that determination by taking proper account of the agreement's definition of arbitrable disputes as including not only merits disputes but also arbitrability disputes.

If follows from *First Options* that contract language giving the arbitrator authority to decide issues related to the legal enforceability of the arbitration agreement does *not* negate the court's FAA § 4 authority and responsibili-

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[3] By contrast, when a court is called upon to determine whether a merits dispute is subject to arbitration, the court applies a "presumption of arbitrability in the sense that '[a]n order to arbitrate the particular [merits dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T*, 475 U.S. at 650, quoting *Warrior & Gulf*, 363 U.S. at 582-83.

ty to determine – applying the standards of FAA § 2 – the legal enforceability of the agreement the court is being asked to enforce. But contract language granting the arbitrator such authority can shape the enforceability issue presented to the court for resolution.

Take, for example, Jackson's objection in this case that the arbitration agreement is substantively unconscionable due to its limitations on discovery regarding the parties' merits dispute over whether Jackson had suffered illegal employment discrimination. Pet. App. 20a. If that were Jackson's only basis for challenging the legal enforceability of the agreement, a court could determine – without addressing the merits of Jackson's objection to the limitations on discovery – that the contract language providing the arbitrator with "authority to resolve any dispute relating to the interpretation, applicability [or] enforceability . . . of this Agreement," *id.* at 9a, saves the agreement from revocation on the asserted ground. The court could reasonably construe this contract language to give the arbitrator the sort of authority possessed by a common law court to strike any "term [of a contract found to be] unconscionable," and "enforce the remainder of the contract without the unconscionable term, or [to] limit the application of any unconscionable term as to avoid any unconscionable result." *Restatement (Second) of Contracts* § 208.[4] On that reading of the agreement, the

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[4] The court considering an FAA petition for an order directing arbitration may not have less authority than the arbitrator to reform an arbitration agreement "to avoid any unconscionable result." *Ibid.* The FAA provides that, if the court finds "that an agreement for arbitration was made . . . and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration *in accordance with the terms thereof*." 9 U.S.C. § 4 (emphasis added). The emphasized statutory language may preclude judicial reformation of an arbitration agreement in ruling on an FAA § 4 petition for an order directing arbitration.

court could determine that the arbitration agreement, taken as a whole, is not unconscionable without itself deciding whether the limitation on discovery is unconscionable.

Other unconscionability objections might not be similarly addressed by contract language giving the arbitrator authority to resolve disputes over application and enforceability of the agreement. For instance, it is difficult to see how an unconscionability objection based on apparent arbitrator bias could be adequately addressed by allowing the arbitrator to resolve that issue. If the arbitrator is, in fact, biased, giving him authority to decide that matter does not alleviate the asserted bias problem. Thus, the court would most likely have to resolve any dispute over the alleged bias of the arbitrator before ordering arbitration.[6]

In this case, the courts below did not decide the revocation issue raised by Jackson. Rather, the court of appeals remanded this case for the district court to determine "whether the agreement to arbitrate arbitrability is itself enforceable." Pet. App. 18a. Thus, the effect of providing the arbitrator with authority to resolve disputes over interpretation and enforceability of the agreement on how the district court was to decide Jackson's unconscionability objection was not addressed by the courts below and is not encompassed in the question presented. The only issue before this Court is whether the court of appeals was correct in ruling that, even "where . . . an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself

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[6] Similarly, assertions that the arbitration agreement was entered into under duress or as a result of fraud must be addressed by the court, since the arbitrator has no authority to resolve any dispute if objections of that sort are sustained.

enforceable is nonetheless for the court to decide as a threshold matter." Pet. App. 18a. That ruling is entirely consistent with the requirements of the Federal Arbitration Act.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations.[1] The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has repeatedly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Granite Rock Co.* v. *International Brotherhood of Teamsters*, No. 08–1214; *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, No. 08–1198; *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza, LLC* v. *Pyett*, 129 S. Ct. 1456 (2009); *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009); *Preston* v.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

Ferrer, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001).

Many members of the Chamber have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Based on the legislative policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. For this reason, the Chamber has a strong interest in ensuring that the federal law of arbitration is appropriately applied and that businesses can rely upon stable arbitration precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether parties to an arbitration agreement may authorize an arbitrator to decide if their agreement is unconscionable is a question with an easy answer. This Court has repeatedly held that the parties have nearly unfettered freedom to tailor the procedures of arbitration and to allocate decision-making authority to the arbitrator. So long as the agreement to do so is clear and unmistakable, the parties may allow the arbitrator to decide whether the arbitration agreement itself is enforceable—and the parties here clearly and unmistakably agreed to do just that.

In reaching the contrary conclusion, the Ninth Circuit continued a pattern of according the contract defense of unconscionability a special status that is neither warranted nor permitted by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. In the Ninth Circuit's view, the threat of unconscionability so pervades mandatory arbitration that no arbitrator could be trusted with evaluating the defense's contours. That sacrosanct status reflects the increasing use in some courts of the elastic concept of unconscionability as a supremely adaptable means of thwarting agreed-upon arbitration procedures.

This case calls for the Court to evaluate whether the Ninth Circuit properly disregarded a clear and unmistakable allocation to an arbitrator of the authority to determine whether an agreement is unconscionable. In doing so, the Court should be mindful of current developments in the use of the unconscionability defense to defeat arbitration agreements.

The unconscionability defense has taken on a life of its own in the arbitration context. Indeed, the defense now appears more often in arbitration cases than in all others combined. That is, in the federal courts of appeals today, the prospective resolution of a dispute in an arbitral rather than a judicial forum is the drastic "evil" that the doctrine of unconscionability most often is invoked to prevent.

In circumvention of the pro-arbitration policies of the FAA, the unconscionability defense has become the principal means for expressing judicial hostility to the alternative resolution of disputes. No longer a recognizable "ground[] * * * for the revocation of any contract" (9 U.S.C. § 2), unconscionability doctrine has been distorted into a ground for fairness review

(and contractual reformation) of every sub-element of the agreed-upon arbitral procedures.

A future case may present this Court with the opportunity to curtail the broadest misuses of unconscionability doctrine. But the Court should start now by ending the misuse before it.

ARGUMENT

I. The Federal Arbitration Act Requires That Arbitration Agreements Be Enforced As Written, Not Altered To Suit Judicial Policy Preferences.

A. Judicial Predilections Should Not Displace Agreed-Upon Arbitration Procedures.

The "primary purpose" of the Federal Arbitration Act is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57–58 (1995). In providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to "ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

In particular, the FAA requires courts to enforce the arbitration procedures set out in the parties' agreement, not procedures that satisfy the preferences of courts or state legislatures. As this Court

reiterated last Term, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1472 (2009). Thus, a party that proves the existence of an arbitration agreement addressing the dispute in question is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. § 4 (emphasis added).

Under the FAA, accordingly, courts must treat an agreement setting out the procedures for dispute resolution as binding contract terms, not as mere suggestions that the court is free to disregard. As this Court has explained, the parties are entitled to "specify *by contract* the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 (emphasis added). Indeed, "procedure" is among the "many features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Consequently, courts should not interfere with terms specifying arbitration procedures or allocating decision-making duties so long as the plaintiff "'effectively may vindicate'" his or her claims through arbitration. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). And courts may not simply assume that the ability to vindicate claims depends on whether the decision-maker is an arbitrator or a court. As this Court has recognized, "the streamlined procedures of arbitration do not entail any consequential restriction on substantive

rights." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987).

To hold that an issue is beyond arbitral competence would reflect the very "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" that the FAA was enacted to halt. *Mitsubishi*, 473 U.S. at 626–627. A party is entitled to arbitrate "in accordance with the terms of the agreement," not according to a judicially preferred structure for alternative dispute resolution. 9 U.S.C. § 3.

B. No Exception Excuses Enforcing The Arbitration Agreement Here As Written—Including Its Allocation Of Decision-Making Authority.

This Court has identified only a handful of narrow exceptions to the FAA's command that arbitration agreements must be "rigorously enforce[d]." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). None of these limited exceptions allows a court to disregard parties' clear and unmistakable agreement to have issues of enforceability—including an unconscionability defense—decided by an arbitrator.

First, an arbitration agreement cannot conflict with a federal statute. The Court has recognized that Congress might identify certain federal statutory rights as non-arbitrable.[2] See *Randolph*, 531 U.S. at

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[2] But the Court overruled its only decision ever to find that Congress had done so. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (holding that claims under the Securities Act of 1933 may be arbitrated), overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953). The Court has rejected the argument every other time it has been advanced.

89–92. And the Court has held that parties cannot agree to procedures that are "at odds" with "textual features" of the FAA itself. *Hall Street*, 128 S. Ct. at 1404 (limiting parties' ability to contract for judicial review by federal courts). But no federal statutory limitation is at issue here.

Second, when a party challenges the validity of an arbitration clause specifically (rather than the contract as a whole), the Court has held that questions of arbitrability presumptively should be decided by a court. See *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See generally *First Options*, 514 U.S. at 942–947. The Court reasoned that most contracting parties are unlikely to contemplate "the significance of having arbitrators decide the scope of their own powers," and the FAA does not "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

That presumption, however, can be overridden by the parties' "clear and unmistakable" agreement to have issues of arbitrability decided by the arbitrator. *First Options*, 514 U.S. at 944 (brackets omitted) (quoting *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1985)). As the Court has explained, "the question 'who has the primary power to decide arbitrability' turns upon *what the parties agreed* about *that* matter." *Id.* at 943 (first emphasis added). Thus, the presumption that a court will de-

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See, e.g., *Randolph*, *supra*, 531 U.S. 79 (Truth in Lending Act); *Gilmer*, *supra*, 500 U.S. 20 (age discrimination); *McMahon*, *supra*, 482 U.S. 220 (Securities Exchange Act of 1934); *Mitsubishi*, *supra*, 473 U.S. 614 (antitrust laws).

cide questions of arbitrability applies only when the agreement is silent. *Ibid.* By contrast, "when the parties submit[] that matter to arbitration" by express agreement, the court "must defer to an arbitrator's arbitrability decision." *Ibid.* Here, the parties unquestionably submitted the enforceability of the arbitration agreement to the arbitrator. See Pet. App. 9a.

Third, the Court has held that under the FAA's savings clause, arbitration agreements—like any other contract terms—are subject to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (citing 9 U.S.C. § 2). In the words of Section 2 of the FAA, arbitration agreements shall be "enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The savings clause in Section 2 "places arbitration agreements on equal footing with all other contracts." *Buckeye*, 546 U.S. at 443. Some courts have construed "equal footing" to permit a state to impose any restriction on arbitration so long as it imposes an equivalent restriction on litigation. See, *e.g.*, *Laster* v. *AT&T Mobility LLC*, 584 F.3d 849, 857–858 (9th Cir. 2009), petition for cert. pending *sub nom. AT&T Mobility LLC* v. *Concepcion* (No. 09–893). That view would allow states to proscribe arbitration indirectly by prohibiting any dispute resolution procedure that places limits on discovery or otherwise diverges from the rules of civil procedure. Yet "th[e] objective [of arbitration] would be frustrated," and the FAA undermined, if parties who agreed to arbitrate could be forced to incorporate all of the same procedures that are part and parcel of litigation. *Preston* v. *Ferrer*, 552 U.S. 346, 358 (2008). To condi-

tion enforcement of arbitration agreements on the inclusion of litigation procedures—or the allocation of certain decision-making functions to a court acting as a gatekeeper—amounts to "an attack on the character of arbitration itself." *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175–176 (5th Cir. 2004).

Moreover, this expansive reading of the savings clause in Section 2 cannot be reconciled with this Court's recent decision in *Preston*. In that case, the Court held that the FAA preempts a California statute that imposed an administrative exhaustion requirement for certain disputes, even though that requirement applied identically to both judicial and arbitral proceedings. 552 U.S. at 342–359.

Far from permitting such interference, the FAA forbids any measures that frustrate the ability of parties to set the terms and procedures of arbitration, "so long as [the terms allow] the prospective litigant effectively [to] vindicate [his or her] * * * cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28 (internal quotation marks omitted); see *Randolph*, 531 U.S. at 90. Applying those principles here, the FAA requires lower courts to respect the parties' choice of decision-maker so long as "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232.

The decision below articulated no reason to doubt that the arbitrator will follow the law when weighing plaintiff's unconscionability challenge to the arbitration agreement, and this Court has already held that an arbitrator is permitted to adjudicate a claim that could render his own authority void. See *Buckeye*, 546 U.S. at 448–449; *Prima Paint*, *supra*, 388 U.S.

395. Accordingly, the Court should enforce the parties' agreement according to its terms.

C. Permitting Courts To Override Clear And Unmistakable Allocations Of Decision-Making Authority Would Have Adverse Practical Consequences.

The decision of the Ninth Circuit should be reversed for another reason. Affirmance would have significant and deleterious practical consequences, effectively rewriting millions of contracts and severely undermining the very interests that arbitration was designed to serve. Relying on this Court's opinion in *First Options*, many businesses entered into contracts with their customers or employees that seek to maximize the efficiencies of arbitration by specifying that the arbitrator will decide issues of enforceability. These businesses have embraced arbitration as a means for resolving the full range of contract disputes, including questions of arbitrability. By allowing these disputes to proceed directly to arbitration, businesses can avoid a slow and costly detour through the courts.

Yet by forcing parties instead to address all threshold issues of arbitrability in the courts, the decision below effectively "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). Before a dispute could proceed to arbitration, a party resisting arbitration might force a "mini-trial in the district court to determine an agreement's validity" (Pet. App. 22a (Hall, J., dissenting)), which may involve burdensome discovery, formal hearings, and time-

consuming interlocutory appeals.[3] Businesses that have entered into millions of contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza*, 129 S. Ct. at 1471) nonetheless would be unable to avoid civil litigation.

That result would thwart the parties' reasonable expectations under this Court's precedents. And by injecting "uncertainty as to procedure and outcome" into the decision whether to agree to arbitrate, such a decision would intensify the perceived "risk [of] using arbitration clauses due to the uncertainty present." Gregory C. Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008). The consequent deterrence of the use of arbitration would frustrate the purpose of the FAA.

* * *

This Court has consistently held that the FAA "compels judicial enforcement of a wide range of written arbitration agreements" according to their terms rather than pursuant to judicial policy prefe-

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[3] As Judge Hall's dissenting reference to a "mini-trial * * * [on] an agreement's validity" suggests (Pet. App. 22a), not every court has heeded this Court's admonition that the FAA "call[s] for an expeditious and summary hearing" on motions to compel arbitration, "with only restricted inquiry into factual issues." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 (1983). Several courts instead have authorized extensive discovery so that parties resisting arbitration might seek support for their unconscionability arguments. See, *e.g.*, *Coneff* v. *AT&T Corp.*, 620 F. Supp. 2d 1248, 1251 n.1 (W.D. Wash. 2009) (noting that motion to compel arbitration was not heard until after 2½ years of "extensive discovery" and motions practice), appeal pending, No. 09–35563 (9th Cir.).

rences. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). The petitioner here is entitled to invoke the parties' clear and unmistakable agreement to have the arbitrator decide issues of enforcement and arbitrability.

II. The Decision Below Reflects A Broadening Misuse And Distortion Of Unconscionability Doctrine To Impose Shifting And Insurmountable Hurdles To Arbitration.

As we pointed out in our *amicus* brief in *Granite Rock Co.* v. *International Brotherhood of Teamsters*, No. 08–1214, even in the face of a purported agreement to submit all issues of arbitrability to the arbitrator, a court must "determine[]" at the threshold "that the contract in fact *exists*." Chamber of Commerce Am. Br. 18 (No. 08–1214). Thus, as the petitioner here recognizes, before adhering to the contractual allocation of decision-making responsibility, a court may address the "making [and] signing * * * of the Arbitration Agreement." Pet. Br. 30.[4]

But once the agreement's making and signing are proved, the arbitrator may be assigned all other tasks—including the determination of unconscionability—so long as the allocation is clear and unmistakable. Unconscionability is a "contract defense[]" (*Doctor's Associates*, 517 U.S. at 686–687), not an issue of objective contract formation. See, *e.g.*, *Marin*

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[4] As Judge Easterbrook observed in distinguishing a potentially arbitrable "defense to enforcement" from "a situation in which no contract came into being," a "person whose signature was forged never agreed to anything," nor did one "whose name was written on a contract by a faithless agent who lacked authority." *Sphere Drake Insurance Ltd.* v. *All American Insurance Co.*, 256 F.3d 587, 590–591 (7th Cir. 2001).

Storage & Trucking, Inc. v. *Benco Contracting & Engineering, Inc.*, 89 Cal. App. 4th 1042, 1049, 107 Cal. Rptr. 2d 645, 651 (2001) ("The doctrine of unconscionability is a defense to the enforcement of a contract or a term thereof.").[5] Thus, a finding that a contract is unconscionable "presupposes an existing contract." *Ibid.*

Yet the decision below seized on "a bare allegation of unconscionability" (Pet. App. 22a (Hall, J., dissenting)) as the basis for disregarding the parties' clear and unmistakable agreement to have the arbitrator determine issues of arbitrability. That misuse of the unconscionability defense as a lever to pry issues away from an arbitrator reflects a broader pattern of shifting judicial impediments to arbitration imposed under the accommodating label of "unconscionability."

The assumption that arbitrators are unfit to decide some aspect of a dispute, even when the parties have expressly stated that they intend for the arbitrator to decide the issue, reflects a recurrence of the once-common "hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City*, 532 U.S. at 111. Although "Congress enacted the FAA 'to overcome judicial resistance to arbitration'" (*Vaden* v. *Discover Bank*, 129

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[5] See also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (discussing unconscionability as one of several limits on "The Scope of Contractual Obligations" where the requirements for contract formation—capacity, assent, and consideration—are met); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 707 (1973) (unconscionability is a "defensive contractual remedy which serves to relieve a party from an unfair contract or from an unfair portion of a contract").

S. Ct. 1262, 1271 (2009) (quoting *Buckeye*, 546 U.S. at 443) (alteration omitted)), hostility to arbitration persists.

Now, however, that hostility manifests primarily through a finely tuned doctrine of unconscionability that permits courts to screen each term of an arbitration agreement based on state social policy. Commentators have observed that many courts evaluating arbitration agreements now "thrust themselves into the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable." Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 486–487. A doctrine that was developed to protect against forfeitures and deprivations of the necessities of life now serves largely as a means to invalidate arbitration agreements.

A. The Unconscionability Defense Has Become Primarily A Means Of Defeating Arbitration Agreements.

1. The Ninth Circuit's use of an unconscionability defense in this case as a reason to override the parties' allocation of decision-making authority to the arbitrator is part of a much broader pattern. A distorted unconscionability doctrine has become the weapon of choice for policy-based attacks on arbitration. The protean concept of unconscionability "provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review." Aaron-Andrew P. Bruhl, *The Unconscionability Game:*

Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. REV. 1420, 1420 (2008).

Even before its revival as a means for thwarting arbitration agreements, unconscionability was understood to be an infinitely malleable doctrine—"a vague concept" and "open-ended[]" in the words of a leading treatise. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:8 (4th ed. 2009). As Judge Younger remarked, "[i]n the area of unconscionability, there is very little logic." Irving Younger, *A Judge's View of Unconscionability*, 13 JUDGES' J. 32, 33 (1974). Rather, the law of unconscionability "seems to add up merely to the proposition that a judge's conscience is his only guide." *Ibid.*

In the arbitration context, unconscionability has become untethered from its moorings. At first, the unconscionability defense provided only a very rare and narrow bulwark against extraordinary unfairness, applied only to contract provisions "that were so unfair as to shock the conscience of the court." E. ALLEN FARNSWORTH, CONTRACTS § 4.27 (4th ed. 2004) (internal quotation marks omitted); see also JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 246 (1835). As Justice Story explained, the doctrine applies only to "bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence * * * as no man in his senses and not under delusion would make." *Id.* § 244.

But now many courts use unconscionability to strike down a vast number of arbitration agreements—including many agreements that, "at the time of formation, [were] arguably in the interests of both parties to the agreement." Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. &

ECON. 293, 306 (1975). In the run of cases, arbitration "benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 264, 264–268 (2006). As the Court observed in the related context of forum-selection provisions, "passengers who purchase tickets containing a forum clause * * * benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991); see *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (noting that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause").

The unconscionability doctrine now used to strike down arbitration agreements bears little resemblance to the traditional and generally applicable unconscionability doctrine. Unconscionability was not meant to allow a party to avoid making good on its promises simply because it (or its lawyer) dislikes the consequences after some particular dispute arises. The courts that deny enforcement to some or all aspects of arbitration agreements on unconscionability grounds often have distorted this doctrine to impose their judicial policy preferences.

2. Unconscionability challenges to arbitration agreements have been steadily increasing. Although less than one percent of arbitration cases in the early 1990s involved an unconscionability challenge, unconscionability defenses more recently appear in 15 to 20 percent of all arbitration cases. Bruhl, *supra*, at

1440–1441. Two recent studies found that more than two-thirds of all unconscionability decisions have addressed arbitration clauses. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004).

Indeed, arbitration continues to provide the primary setting for the unconscionability doctrine in the courts of appeals. Our independent review shows that more than 60 percent of the federal appellate decisions that adjudicated claims of unconscionability between 2005 and 2009 involved challenges to arbitration agreements.[6]

In addition, unconscionability challenges succeed much more often in arbitration cases than in other settings. One study of unconscionability cases decided in 2002–2003 found that courts are twice as likely to declare arbitration agreements unconscionable as they are other types of contract provisions.

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[6] We searched Westlaw's U.S. Courts of Appeals database (CTA) for all unconscionability challenges to contract provisions in decisions issued from 2005 through 2009, using the following search string: di(unconscionab!) & (contract! agreement!). The di() modifier limits the search to the Westlaw-supplied digest field, which helps to avoid cases that make only some incidental reference to unconscionability without actually analyzing an unconscionability claim, but also limits the search to published cases plus a few nonprecedential cases that Westlaw chose to report in the Federal Appendix. Review of the 160 cases identified by that search revealed 98 decisions adjudicating unconscionability on the merits, of which 61 involved challenges to arbitration agreements.

Randall, *supra*, at 196.[7] Another study of all California state-court decisions from 1986 through 2006 found that unconscionability challenges to arbitration provisions were successful in 58 percent of all cases, while unconscionability challenges to all other contract provisions succeeded only 11 percent of the time. Broome, *supra*, at 44–48.[8]

These studies attribute the disparity to the use of substantially different unconscionability standards in arbitration cases. See Broome, *supra*, at 52–65; Randall, *supra*, at 198, 214–216. Any such use of differing standards, of course, would violate the FAA's prohibition on "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356 (citing *Doctor's Associates*, 517 U.S. at 687).

B. The Decision Below Illustrates How Unconscionability Doctrine Has Become A Universal Shield Against Arbitration.

1. The present case provides insight into the transformation of unconscionability doctrine into a means to defeat arbitration agreements based on principles and policies that are applicable only to the

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[7] See also, *e.g.*, *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 375 (N.C. 2008) (Newby, J., dissenting from refusal to enforce arbitration agreement) ("For the first time in our history, a North Carolina appellate court has found a contract to be unconscionable.").

[8] Our own review, see n.6, *supra*, revealed that 41 percent of unconscionability challenges to arbitration clauses succeed in the courts of appeals generally (25 of 61), but the success rate is 73 percent in the Ninth Circuit (19 of 26). In cases not involving arbitration clauses, the success rate is 11 percent overall (4 of 37), and zero in the Ninth Circuit (11 cases).

context of dispute resolution rather than to contracts generally. As the California Supreme Court observed, "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 119, 6 P.3d 669, 771 (2000). This "peculiar"—that is, consciously idiosyncratic—approach cannot be reconciled with this Court's holding that the FAA preempts any state law that "imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356.

California law provides the most striking example of the transformation of unconscionability doctrine in the arbitration context. It is that state's law that in large part provides the basis for the unconscionability contentions that the Ninth Circuit held were beyond an arbitrator's competence notwithstanding the parties' clear and unmistakable agreement to refer those issues to arbitration.[9]

As the Ninth Circuit put it in the decision below, "[s]ubstantive unconscionability arises when contract terms are one-sided." Pet. App. 18a. But "one-sided" has become a justification for a term-by-term analysis of arbitration agreements to determine whether each term not only applies equally to each party, but benefits each party equally—an exaggerated point-

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[9] The respondent here relied primarily on California law in contending that certain provisions in the arbitration agreement were unconscionable. See J.A. 42–45; see also Pet. App. 19a (examining the Supreme Court of Nevada's decision in *D.R. Horton, Inc.* v. *Green*, 120 Nev. 549, 557–558, 96 P.3d 1159, 1165 (2004) (per curiam), including its citation of the Ninth Circuit's California-law decision in *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir. 2003)).

by-point mutuality requirement that most certainly does *not* apply to contracts generally.

Indeed, as the dissent below recognized, the core of the respondent's unconscionability defense was the notion that the arbitration agreement "lacks mutuality." Pet. App. 21a. That asserted ground of unconscionability—the supposed one-sidedness of the scope of the clause—illustrates the trend. Although the scope of the clause is the same for both parties, respondent contends that, because not all issues are referable to arbitration—workers' compensation claims and injunctive relief against trade secret theft and the like are excluded—the agreement unfairly requires an employee to arbitrate most of his or her claims while allowing the employer relatively more effective access to the courts. See J.A. 42–43. That contention finds support in California precedent. State courts have held that any agreement requiring arbitration of some but not all possible claims arising from the same set of transactions is unconscionable because it lacks mutuality. See *Mercuro* v. *Superior Court*, 96 Cal. App. 4th 167, 176–177, 116 Cal.Rptr. 2d 671, 677 (2002) (citing *Armendariz*, 24 Cal. 4th at 120, 6 P.3d at 772).

Similarly, the respondent contended that the arbitration clause's fully reciprocal discovery limitation (subject to the arbitrator's ordering further discovery) was unconscionably one-sided although it applied equally to each party. See J.A. 43–44. Again, California jurisprudence supports that claim. See, *e.g.*, *Ontiveros* v. *DHL Express (USA), Inc.*, 164 Cal. App. 4th 494, 511–513, 79 Cal. Rptr. 3d 471, 486–487 (2008), cert. denied, 129 S. Ct. 1048 (2009).

Similarly enhanced mutuality requirements have led California courts addressing the question pre-

sented here to hold that a "provision for arbitrator determinations of unconscionability is also *itself* substantively unconscionable." *Murphy* v. *Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 145, 67 Cal. Rptr. 3d 120, 125 (2007) (emphasis added). The stated basis for this holding was that the allocation of decision-making authority is "entirely one-sided because defendant cannot be expected to claim that it drafted an unconscionable agreement." *Ibid.* See also *Ontiveros*, 164 Cal. App. 4th at 505, 79 Cal. Rptr. 3d at 480–481.

Reflecting the breadth of this arbitration-specific mutuality requirement, the California courts also have held that a requirement that both parties pursue their claims in individual arbitration rather than using class action procedures is unconscionable because that part of the arbitration clause (in the courts' view) benefits a business more than a consumer or employee. The California Supreme Court held that "class action or arbitration waivers are indisputably one-sided," explaining its unique view of point-by-point mutuality in these terms: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits." *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 161, 113 P.3d 1100, 1109 (2005) (quoting *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094, 1101, 118 Cal. Rptr. 2d 862, 867 (2002)).

Yet the requirement of such precise mutuality—not only of obligation, but of the effects and benefits of particular mutual obligations—is truly "peculiar to the arbitration context." *Armendariz*, 24 Cal.4th at

119, 6 P.3d at 771. The general rule of contract law is to the contrary: "If the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged, or mutuality of obligation." *Foley* v. *Interactive Data Corp.*, 47 Cal. 3d 654, 672 n.14, 765 P.2d 373, 381 n.14 (1988) (internal quotation marks omitted). See RESTATEMENT (SECOND) OF CONTRACTS § 79 (using identical language). Indeed, "the so-called requirement of mutuality of obligation is now widely discredited. 2 JOSEPH M. PERILLO & HELEN HADJIYANNIKAS BENDER, CORBIN ON CONTRACTS § 6.1 (rev. ed. 1995); see also RESTATEMENT (SECOND) OF CONTRACTS § 363, cmt. c (although "[i]t has sometimes been said that there is a requirement of 'mutuality of remedy[]' * * *, the law does not require that the parties have similar remedies in case of breach").

This Court has suggested that the FAA requires the same holistic analysis that applies to contracts generally: no court may "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix*, 513 U.S. at 281. That is, an arbitration agreement must be enforced unless the entire contract is so unfair as to fall afoul of generally applicable contract law doctrine; a court may not dissect the fairness of the arbitration provision viewed in isolation, much less some isolated aspect of the arbitration agreement. Certainly the limited savings clause in Section 2 does not authorize courts to pick apart each element of agreed-upon arbitration procedures and eliminate—or deny enforcement based on—any feature that the court considers more beneficial to one side.

At the core of the evolving arbitration-specific unconscionability doctrine is lingering judicial mistrust and hostility toward the arbitral forum. Courts increasingly treat arbitration itself—particularly the informal, individual arbitration that the FAA contemplates—as a grave harm from which a solicitous judiciary must bend every effort within its common-law powers to protect consumers and employees. That is, a requirement to arbitrate rather than litigate is itself a harm so substantial that it raises the specter of unconscionability whenever it is imposed. See generally Broome, *supra*; Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61.

These courts no longer use generally applicable contract doctrines to invalidate shockingly oppressive contracts that happen to involve arbitration. Rather, they have distorted background principles of unconscionability law in a misguided attempt to protect parties from the arbitral forum. Neither the FAA nor the jurisprudence of this Court permits reliance on the premise that arbitration is itself a detriment.

2. The decision below reflects the status of the Ninth Circuit as "the circuit most hospitable to state unconscionability rulings" that restrict arbitration (Bruhl, *supra*, at 1481), no doubt because that Circuit includes California. For example, the Ninth Circuit has held that the mere presence of an arbitration clause in an employment contract creates a "rebuttable presumption of substantive unconscionability." *Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003). It is difficult to imagine a clear-

er manifestation of the "judicial suspicion of the desirability of arbitration" that the FAA was intended to dispel. *Mitsubishi*, 473 U.S. at 626–627. And any such presumption of unconscionability falls afoul of this Court's admonition in *Gilmer* that the "[m]ere inequality in bargaining power" between employers and employees provides no basis for heightened judicial scrutiny of arbitration agreements in employment contracts. 500 U.S. at 33.

To the same effect, the Ninth Circuit—again applying California law—recently held that agreements to arbitrate on an individual rather than a class-wide basis are unconscionable, even if the arbitration agreement is structured to "essentially guarantee that [a] company will make any aggrieved consumer whole who files a claim." *Laster*, 584 F.3d at 856 n.9. That is, state public policy favoring class actions prevails over the federal public policy that permits parties to "trade[] the procedures * * * of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

Unwilling to be geographically constrained in applying California's arbitration-specific unconscionability doctrine, the Ninth Circuit has refused to enforce clear and otherwise-valid choice-of-law provisions when the designated forum permits arbitration procedures that California deems unconscionable. See *Omstead* v. *Dell, Inc.*, ___ F.3d ___, No. 08–16479, 2010 WL 396089, at *3–4 (9th Cir. Feb. 5 2010) (holding that choice of Texas law violated California's fundamental public policy because Texas enforces agreements to arbitrate on an individual ba-

sis).[10] See also *Masters* v. *DirecTV, Inc.*, No. 08–55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (unpublished) (applying California law to invalidate arbitration agreements by customers nationwide). By imposing California unconscionability law even upon contracts that expressly adopt the law of another state, the Ninth Circuit has struck down arbitration clauses that other states—and other circuits—would enforce.[11]

The willingness of the court below to override clear and unmistakable contract terms based on a "bare allegation of unconscionability" (Pet. App. 22a) underscores the doctrine's special status as a silver bullet to defeat obligations to arbitrate. Cf. *Randolph*, 531 U.S. at 91 (unsubstantiated "'risk' that [a claimant] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement"). This case provides an appropriate point to begin rolling back that improper development in the law.

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[10] The result in *Omstead* accords with a California state court decision, *Klussman* v. *Cross Country Bank*, 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728 (2005), that preceded the application of the Class Action Fairness Act of 2005.

[11] See, *e.g.*, *Pleasants* v. *American Express Co.*, 541 F.3d 853 (8th Cir. 2008) (Missouri law); *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007) (Pennsylvania and Virginia law); *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law); *Jenkins* v. *First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877–878 (11th Cir. 2005) (Georgia law); *Iberia Credit Bureau*, *supra*, 379 F.3d 152 (Louisiana law); *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); cf. *Livingston* v. *Associates Finance, Inc.*, 339 F.3d 553, 559 (7th Cir. 2003).

3. By contrast with the expansive use of unconscionability doctrine as a means to alter or invalidate arbitration agreements, this Court's decisions indicate that a party resisting arbitration on grounds of unconscionability should rarely succeed. As the Court has observed, arbitration agreements function as "a specialized kind of forum-selection clause." *Scherk*, 417 U.S. at 519. Indeed, forum-selection clauses seek to provide many of the same benefits that motivate businesses to enter into arbitration agreements, including "the salutary effect of dispelling any confusion about [how disputes] arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions * * * and conserving resources that otherwise would be devoted to deciding those motions." *Carnival Cruise Lines*, 499 U.S. at 593–594. And as this Court's forum-selection decisions show, a party challenging such an agreement as unconscionable or unreasonable must satisfy a demanding test.

In *M/S Bremen* v. *Zapata Off-Shore Co.*, this Court held that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. 1, 10 (1972). The Court went on to explain that the party opposing enforcement "bear[s] a heavy burden," and that it would be "incumbent on th[at] party * * * to show that trial in the contractual forum will be *so gravely difficult and inconvenient* that he will for all practical purposes be *deprived of his day in court*." *Id.* at 17, 18 (emphasis added). "Absent that," the Court held, "there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18. In a subsequent decision, the Court affirmed that the same rule applies to

forum-selection clauses in "form contract[s] the terms of which are not subject to negotiation," and where the parties lack "bargaining parity." *Carnival Cruise Lines*, 499 U.S. at 593.

These decisions, and decisions under the FAA, make clear that an arbitration clause should not be refused enforcement merely for perceived, general unfairness unless one party would be effectively deprived of access to the tribunal (for example, by excessive fees) or would be unable to vindicate his claims (for example, because of excessive restrictions on remedies). See, *e.g.*, *Randolph*, 531 U.S. at 90–91; *Gilmer*, 500 U.S. at 28; *Mitsubishi*, 473 U.S. at 637. But if both parties have access to an arbitral proceeding in which each will be able to vindicate its claims, the mere submission of a dispute (or an issue) to an arbitrator cannot trigger any valid, generally applicable contract defense within the meaning of Section 2.

In the absence of some special hardship far beyond any of the procedural simplifications routine in the arbitral forum, generally applicable unconscionability law—the only type cognizable under Section 2 of the FAA—should not pose any impediment to the enforcement of arbitration agreements. And once illicit suspicion of the arbitrator's decision-making integrity is removed from the equation, no hurdle bars enforcement of the allocation to an arbitrator of the responsibility to decide whether the arbitration agreement is unconscionable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.[1]

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to 42 U.S.C. § 1981 and other federal employment-related laws and regulations. Some of them have contracts with their employees requiring arbitration of employment-related claims and disputes.

Thus, the issues presented in this case are extremely important to the nationwide consistency that EEAC represents. The decision below held that when a plaintiff opposes a motion to compel arbitration by challenging the arbitration agreement as unconscionable, the court must decide the question of arbitrability even though the agreement provides otherwise. This conclusion not only runs counter to this Court's prior pronouncements, but also threatens the acknowledged benefits of arbitration as a fair, efficient, and effective means of resolving employment disputes.

Because of its interest in the subject, EEAC has filed *amicus curiae* briefs in a number of cases in this Court supporting the enforceability of arbitration

agreements.[2] EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

When Rent-A-Center, West, Inc. (Rent-A-Center) hired Antonio Jackson, he signed a mandatory arbitration agreement as a condition of employment. Pet. App. 8a. The agreement provided that the parties agreed to submit to arbitration any and all claims arising from Jackson's employment, including claims of employment discrimination. Pet. App. 8a-9a. It also contained the following provision:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable.

Pet. App. 9a.

Several years later, Jackson sued Rent-A-Center in federal court, accusing the company of race discrimination and retaliation in violation of 42 U.S.C. § 1981. Pet. App. 8a. Rent-A-Center moved to dismiss and to compel arbitration pursuant to the agreement.

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[2] *See, e.g., 14 Penn Plaza LLC v. Pyett*, __ U.S. __, 129 S. Ct. 1456 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Id. Jackson opposed the motion, contending that the arbitration agreement was unconscionable and therefore unenforceable. Pet. App. 9a. Jackson argued that the agreement was a non-negotiable form contract offered to him on a "take it or leave it" basis, and thus was procedurally unconscionable. *Id.* He also contended that the agreement contained one-sided coverage and discovery provisions and required that the arbitrator's fee be shared equally, rendering it substantively unconscionable as well. *Id.*

The district court granted the motion. It found that the arbitration agreement "clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable" and held that "the question of arbitrability is for the arbitrator." *Id.* The district court also ruled that Jackson had failed to show that the agreement was substantively unconscionable in any event. Pet. App. 9a-10a. Jackson appealed to the Ninth Circuit.

The Ninth Circuit panel majority acknowledged that the arbitration agreement states unequivocally that questions of validity are to be decided by the arbitrator. Pet. App. 9a. Nevertheless, it held that the mere allegation by Jackson that the agreement was unconscionable required the issue be resolved by a court rather than an arbitrator. Pet. App. 11a. It held that "where a party specifically challenges arbitration provisions as unconscionable that hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine . . . even where the agreement's express terms delegate that determination to the arbitrator." *Id.*

Judge Hall dissented. She began by pointing out that this case "concerns an arbitration agreement more favorable to the employee than most this court sees" and in that respect "was not even a run-of-the-mill arbitration agreement." Pet. App. 21a & n.1 (Hall, J., dissenting). She observed that Jackson's unconscionability claims "also are vaguer than most." Pet. App. 21a & n.2. She pointed out that the majority's holding is contrary to the federal policy favoring arbitration and is inconsistent with a long line of this Court's decisions, including *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Pet. App. 22a-24a. She also expressed her well-founded concern that the majority's holding "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even* when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a.

Rent-A-Center filed a petition for a writ of certiorari, which this Court granted on January 15, 2010.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v.*

Byrd, 470 U.S. 213, 221 (1985)). Thus, the federal policy favoring arbitration, grounded in the principle that an agreement between the parties should be enforced, mandates that doubts be resolved in favor of arbitration.

This Court has created a narrow exception to that broad federal policy, a general rule that *"[u]nless the parties clearly and unmistakably provide otherwise,"* where certain "gateway" issues arise that the parties likely would have believed would be resolved by the court rather than by the arbitrator, those issues are for the court. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 656 (1986)) (emphasis added); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Thus, according to the Court's clear language, that narrow exception does not apply where the parties have clearly and unmistakably agreed to arbitrate arbitrability. *Terminix Int'l Co. v. Palmer Ranch L.P.*, 432 F.3d 1327 (11th Cir. 2005); *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003); *Bell v. Cendant Corp.*, 293 F.3d 563 (2d Cir. 2002); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). Moreover, mere allegations of procedural differences between the courtroom and an arbitral forum, such as the discovery limitations and fee-splitting provisions cited by Respondent as rendering his agreement procedurally unconscionable, are not valid challenges to arbitrability.

Requiring a court to deny arbitration and decide arbitrability even though the parties have agreed otherwise would have the unfortunate consequence of putting the parties in court, "litigating whether or not they should be litigating," *Terminix*, 432 F.3d at

1329 (citation omitted), in nearly every case. Such a result would defeat the practical purposes of arbitration, and erase its considerable benefits.

As this Court noted in *Circuit City Stores, Inc. v. Adams*, there are "real benefits to the enforcement of arbitration provisions." 532 U.S. 105, 122-23 (2001). In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* at 123. Thus, arbitration can make justice available to those for whom the justice system is infeasible. When the parties clearly and unmistakably have agreed that an arbitrator would rule on arbitrability, overriding the benefits of arbitration and requiring the parties to litigate over litigating seems particularly inappropriate.

ARGUMENT

I. WHERE AN ARBITRATION AGREEMENT "CLEARLY AND UNMISTAKABLY" COMMITS TO THE ARBITRATOR THE QUESTION OF THE AGREEMENT'S VALIDITY, THAT ISSUE IS FOR THE ARBITRATOR

This Court has stated that *"[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 656 (1986) (emphasis added); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). It follows that when the parties "clearly and unmistakably provide" that the question is for the arbitrator, then the question is to be decided by the

arbitrator, not the court. For this reason, the decision below must be reversed.

A. The Federal Arbitration Act Requires Courts To Order Arbitration Of Those Issues Which The Parties Have Agreed To Arbitrate

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This language "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25 (footnote omitted). Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*

Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985) (citations omitted).

B. When It Is Clear And Unmistakable That The Parties Have Agreed To Have The Arbitrator Decide Arbitrability Questions, That Agreement Must Be Enforced

Against this backdrop, this Court has decided several cases dealing with the issue of whether and when the question of arbitrability itself is one for arbitration. *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643 (1986); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Once again, the ultimate focus is on the agreement of the parties. If they have agreed to arbitrate arbitrability, then all questions of arbitrability are for the arbitrator.

In *AT&T Technologies, Inc. v. Communications Workers of America*, which arose in the context of labor arbitration under a collective-bargaining agreement, this Court articulated a general rule "that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." 475 U.S. 643, 649 (1986) (citation omitted). Based on the principle that a party can be compelled to arbitrate only those issues he has agreed to arbitrate, this Court concluded that "*[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (citation omitted) (emphasis added). *Cf. United Steel-*

workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960) ("Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, *the claimant must bear the burden of a clear demonstration of that purpose*") (emphasis added). Thus, even as it created the general rule that questions of arbitrability are for the court to decide, the Court also emphasized that parties could, by contract, avoid the general rule by "clearly and unmistakably" consigning those issues to the arbitrator.

Later, in *First Options of Chicago, Inc. v. Kaplan*, dealing with the appropriate standard of review of a decision on arbitrability, this Court reiterated the general rule and its limitations, stating that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.*" 514 U.S. 938, 944 (1995) (quoting *AT&T Technologies*, 75 U.S. at 649) (emphasis added). Here too, then, the Court reserved applicability of the general rule for situations in which the parties had not agreed to place questions of arbitrability in the hands of the arbitrator. As this Court said in *First Options*:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?

514 U.S. at 943 (citations omitted). It follows that where there is clear and unmistakable evidence

that the parties agreed to arbitrate arbitrability, the general rule does not apply, and courts can and should enforce the agreement of the parties.

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court highlighted the extreme narrowness of the general rule that courts decide some arbitrability questions unless the parties have agreed otherwise. There, the Court characterized the general rule as an exception to "the liberal federal policy favoring arbitration agreements." *Id.* at 83 (citations and internal quotation omitted). It noted that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* (quoting *AT&T Technologies* and citing *First Options*). The Court pointed out, however, that not every question of arbitrability is even subject to the general rule, but only some of those "gateway" issues that parties "would likely have expected a court to have decided" and "are not likely to have thought that they had agreed that an arbitrator would do so . . . ." *Id.* at 83-84. Applying this rule, this Court concluded that the question of the applicability of a National Association of Securities Dealers procedural rule was for the arbitrator to decide.[3]

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[3] In *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), this Court rejected a contention that a dispute should not go to arbitration merely because the potential plaintiffs contended that their arbitration agreement was unenforceable because it appeared to preclude an award of treble damages to which the plaintiffs might be entitled under the federal statute in question, thereby denying them "meaningful relief" under that statute. In so doing, this Court reiterated that not every

The Court again emphasized the narrowness of the general rule in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), holding that the question of whether an arbitration may proceed on a class-wide basis where the underlying arbitration agreement is unclear as to the availability of such procedures is for the arbitrator, not a court, to decide. Here again, the Court was careful to point out that the general rule applies only where the parties have not agreed to arbitrate the issue. The Court said, "[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (*in the absence of 'clear and unmistakable' evidence to the contrary*)." *Id.* at 452 (emphasis added).

From this line of cases there arise several constant themes. First, the federal policy favoring arbitration, grounded in the principle that an agreement between the parties should be enforced, mandates that doubts be resolved in favor of arbitration. Second, there is a narrow exception to that principle, a general rule that where certain "gateway" issues arise that the parties likely would have believed would be resolved by the court rather than by the arbitrator, those issues are for the court. Third, the exception does not apply where the parties have clearly and unmistakably agreed to arbitrate those issues.

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question of arbitrability, and indeed not even every "gateway" question, is for a court to decide under the narrow general rule. Rather, the rule applies only in those few situations when the parties likely would have expected the court, not the arbitrator, to decide the question. *Id.* at 407 n.2 (citing *Howsam*). This Court concluded that the remedies question was not the kind that falls within the exception.

The case before the Court is one in which the narrow exception does not apply. The arbitration agreement in question indeed clearly and unmistakably assigns questions of arbitrability to the arbitrator, as the court below acknowledged. Pet. App. 13a. ("In contrast to *First Options*, we are not presented with 'silence or ambiguity on the who should decide the arbitrability point.' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator"). Under this Court's decisions that is where the inquiry ends.[4]

C. This Court Should Confirm The Conclusion Of The Courts Of Appeals For The First, Second, Eighth And Eleventh Circuits That The Narrow Rule Sending Some Arbitrability Questions To Court Does Not Apply When The Parties Have Agreed To Arbitrate Them

The First, Second, Eighth and Eleventh Circuits already have concluded that the general rule consigning some questions of arbitrability to the

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[4] The court below misapplied this Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In *Buckeye Check Cashing*, this Court held that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449. *Buckeye* does not, however, stand for the proposition that where a challenge is made to a stand-alone arbitration agreement, the issue of the validity of the agreement is for the court. In any event, the Court in *Buckeye* was not presented with a situation in which the arbitration agreement clearly and unmistakably delegated questions of arbitrability to the arbitrator.

court does not apply when the parties have agreed otherwise, and in that case, the parties' agreement should be enforced. In *Apollo Computer, Inc. v. Berg*, the First Circuit said that "[p]arties may, however, agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute." 886 F.2d 469, 473 (1st Cir. 1989). The court then held that where the agreement incorporated the arbitration rules of the International Chamber of Commerce, which included a provision allowing the arbitrator to determine her own jurisdiction, the agreement "clearly and unmistakably" allowed the arbitrator to determine whether an agreement to arbitrate existed, even though absent such an agreement, the question would be for the court.[5]

The Second Circuit in *Bell v. Cendant Corp.*, relying on *First Options*, likewise concluded that arbitrability issues go to the arbitrator "if 'there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.'" 293 F.3d 563, 566 (2d Cir. 2002) (citation omitted). The court

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[5] The First Circuit's later opinion in *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009), relied on by the court below, does not undermine its conclusion in *Apollo*. In *Awuah*, as Judge Hall explained in her dissent to the Ninth Circuit's opinion, the First Circuit would have sent the arbitrability issues to the arbitrator had the question simply been one of unconscionability. Pet. App. 23a. (Hall, J., dissenting). Under *Awuah*, "even if an agreement was alleged to be unconscionable, enforcement of the parties' agreement to send that question to arbitration would still be proper unless the party resisting arbitration met the 'high' burden of showing that the arbitration was an illusory remedy." *Id.* at n.4.

then ruled that such evidence indeed was present, so that the question should go to the arbitrator. Later, relying on *Bell* and *Apollo*, the Second Circuit similarly ruled in *Contec Corp. v. Remote Solution Co.*, that the arbitration clause in question, which incorporated the Commercial Arbitration Rules of the American Arbitration Association (AAA), including a rule giving the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," was "clear and unmistakable evidence" that the parties had agreed to arbitrate the question of arbitrability. 398 F.3d 205, 208 (2d Cir. 2005).

In *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003), the district court had ruled that an arbitration agreement was unenforceable as to the plaintiffs' overtime compensation claims because it found some terms of the agreement to be inconsistent with some of the plaintiffs' procedural and remedial rights under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219. The Eighth Circuit determined that in *AT&T Technologies*, this Court "adopted the rule that issues of arbitrability are to be decided by the arbitrator in the first instance if the agreement to arbitrate 'clearly and unmistakably' so provides." *Bailey* at 824. Concluding that "[i]n this case, the Arbitration Agreement clearly and unmistakably left the issues addressed by the district court to the arbitrators in the first instance," *id.*, the Eighth Circuit said that the district court should not have ruled on the arbitrability question, which should go to arbitration. *See also Fallo v. High-Tech Inst.*, 559 F.3d 874, 877 (8th Cir. 2009) (applying this Court's decisions in *AT&T Technologies* and *First Options* to conclude correctly that its task was to "determine

whether the parties to the enrollment agreement 'clearly and unmistakably' intended for an arbitrator to determine the question of arbitrability").

The Eleventh Circuit agrees. In *Terminix International Co. v. Palmer Ranch L.P.*, the Eleventh Circuit held that because the arbitration agreement incorporated an AAA rule providing that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," "the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." 432 F.3d 1327, 1332 (11th Cir. 2005) (citation and internal quotation omitted).

The First, Second, Eighth and Eleventh Circuits, unlike the Ninth,[6] have reached the conclusion that follows logically from this Court's decisions in *AT&T Technologies*, *First Options*, and those that follow. We respectfully submit that this Court should follow that course as well.

D. Mere Allegations Of Unconscionability Do Not Justify Removing Arbitrability Issues From The Arbitrator In The Face Of A Clear And Unmistakable Agreement

This Court already has rejected the notion that mere allegations of procedural differences between

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[6] The U.S. Court of Appeals for the Federal Circuit, while also recognizing that questions of arbitrability are for the arbitrator where the parties "clearly and unmistakably" have so agreed, has added another hurdle—that the district court also must "perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), apparently a peculiarity of California law.

the courtroom and an arbitral forum, such as the discovery limitations and fee-splitting provisions cited by Respondent as rendering his agreement procedurally unconscionable, are valid challenges to arbitrability. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (rejecting "a host of challenges to the adequacy of arbitration procedures"). Even where a party challenging arbitration contends that the arbitral form is inaccessible due to its cost, this Court has ordered arbitration absent an actual showing that arbitration would be prohibitively expensive. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

Similarly, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer*, 500 U.S. at 33. As the Court observed in *Gilmer*, relationships often involve some degree of difference in bargaining power. *Id.* Indeed, more often than not, one party to a contract will have more bargaining power than the other. In residential mortgages and other forms of consumer loan obligations, the lender usually is a commercial entity and the borrower an individual. In residential leases and other non-commercial real estate transactions, the lessor or seller typically owns real estate and the lessee or buyer does not. Likewise, for all but the smallest businesses, an employer typically is an entity while the prospective employee is an individual.

The Ninth Circuit's characterization of such a relationship as involving "grossly unequal bargaining power," Pet. App. 16a, is a significant exaggeration. Like any prospective party to a contract, Respondent *could* have voted with his feet. Just as a lender

wants to lend, a lessor wants to lease, and a seller wants to sell, an employer wants to hire, because there is money to be made in the transaction. Like any prospective borrower, lessee, buyer, or employee, Respondent had a substantial bargaining chip to give or withhold at his own discretion. Just as a borrower who dislikes the prospective terms of a mortgage, a lessee who chafes at the terms of a lease, or a buyer who finds the terms of an offer objectionable may take his business elsewhere, Respondent could have chosen not to work for Rent-A-Center under the terms offered.

Accordingly, Respondent's contention that his arbitration agreement is unenforceable because, as the Ninth Circuit put it, "he did not meaningfully assent to the agreement," Pet. App. 15a, due to an inequality in bargaining power, is insufficient to override the fact that he did indeed agree to arbitrate any employment claims against Rent-A-Center, including issues of arbitrability. While the Ninth Circuit's opinion below is not obviously "littered with . . . overt hostility to the enforcement of arbitration agreements . . . ," *14 Penn Plaza*, 129 S. Ct. at 1470 (footnote omitted), the very holding evidences precisely "the old judicial hostility to arbitration," *Rodriguez de Quijas*, 490 U.S. at 480 (citation and internal quotation omitted), that this Court has rejected in *Rodriguez de Quijas*, *Gilmer*, and subsequent cases.

Therefore, the Ninth Circuit's holding is simply untenable under this Court's decisions, which have been applied correctly by other courts of appeals, and thus should be reversed.

II. COMPELLING LITIGATION OVER ARBITRABILITY EVERY TIME A PARTY SEEKING TO AVOID ARBITRATION CLAIMS UNCONSCIONABILITY WOULD OBLITERATE THE MANY BENEFITS THAT ARBITRATION OFFERS

A. Requiring Courts To Rule On Allegations Of Unconscionability Even Where The Parties Have Agreed To Arbitrate Would Guarantee Litigating Over Litigating In Every Case

Were the decision below permitted to stand, the unfortunate consequence would be to require trial courts to wrest issues of arbitrability away from the arbitrator, despite clear and unmistakable evidence that the parties intended to arbitrate those issues, any and every time a party seeking to avoid arbitration claims that the arbitration provisions are unconscionable. As a practical matter, such a challenge could, and probably would, be articulated in nearly every case. As Judge Hall said in her dissent, the instant case involves "an arbitration agreement more favorable than most and unconscionability allegations that are thinner than most," Pet. App. 21a-22a (Hall, J., dissenting). It is predictable, then, that with an exercise of legal creativity, some fault could be found in nearly every arbitration agreement sufficient to raise a claim of unconscionability.

Thus, the effect of the decision below is to expand the narrow exception this Court has created to a magnitude that quite engulfs the policy favoring arbitration. In each case in which an employer seeks—as Rent-A-Center did here—to enforce an arbitration agreement that clearly and unmistakably consigns

issues of arbitrability to the arbitrator, the language of the agreement would be overpowered solely by a mere allegation of unconscionability. The parties would be in court, "litigating whether or not they should be litigating," *Terminix*, 432 F.3d at 1329 (citation omitted), in every case. As Judge Hall observed in her dissent to the decision below, the Ninth Circuit majority's holding "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even* when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a (Hall, J., dissenting).

B. Litigating Over Litigating, Prior To Arbitration, Defeats The Practical Purposes Of Arbitration And Erases Its Considerable Benefits

As Judge Hall foresaw, a rule requiring courts to decide questions of arbitrability would send every case in which a party opposes arbitration to court, there to plead his case of unconscionability, however thin, in a "mini-trial," despite the fact that he agreed to arbitrate such issues. Such a result undermines not only the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but also the significant advantages that arbitration of employment disputes offers to both employers and employees—prompt and efficient, and hence less costly and disruptive, resolution. As this Court noted in *Circuit City Stores, Inc. v. Adams*, there are "real benefits to the enforcement of arbitration provisions." 532 U.S. 105, 122-23 (2001). In

particular, arbitration allows employees to "'trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *14 Penn Plaza v. Pyett*, __ U.S. __, 129 S. Ct. 1456, 1471 (2009) (quoting *Mitsubishi Motors*, 473 U.S. at 628).

One significant benefit is the reduction of cost, making arbitration affordable where litigation may not be. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.*, 532 U.S. at 123. Indeed, parties generally favor arbitration precisely because of the economics of dispute resolution. *14 Penn Plaza*, 129 S. Ct. at 1464.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) at 153-54. Indeed, "[b]y reducing the costs, private arbitration holds the potential for

bringing justice to many to whom it is currently denied." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Human Rights L. Rev. 29, 63 (1998).

In particular, arbitration offers lower-level employees an opportunity to bring forth claims that would not be economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 1 (2003). Similarly:

> The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted).

One element of the cost factor is efficiency. The speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal district courts take an average of 33.1 months to complete a civil case through jury trial. Admin. Office of the U.S. Courts, Fed. Judicial Caseload Statistics, Table C-5 (Apr. 1, 2008 - Mar. 31, 2009).[7] In contrast, according to the National Arbitration Forum, the "average length of [an arbitration] from filing to award was 4.35 months for claims brought by consumers against businesses and 5.6 months for claims brought by businesses against consumers."

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[7] *available at* http://www.uscourts.gov/caseload2009/tables/C05Mar09.pdf

Nat'l Arbitration Forum, *The Benefits of Arbitration* (Sept. 2007 & Supp. Apr. 2009).[8]

In addition to reducing the costs and the amount of time within which their disputes are likely to be heard, arbitration provides employees with a much better chance of having their "day in court" than does a judicial proceeding. Of course, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). *See also 14 Penn Plaza* ("[t]he decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance"). 129 S. Ct. at 1469. Thus, an employee who arbitrates his employment-related claims retains all of the substantive rights he would have had if he had gone to court instead.

Indeed, not only are an employee's chances of getting a hearing better in arbitration, but his chances of success appear to be better as well. "All of the studies find that employees prevail more often in arbitration than they do in court. And while successful plaintiffs receive less in arbitration than in court, plaintiffs as a whole recover more." *Maltby*, *supra*, at 54.

Accordingly, as this Court has recognized on numerous occasions, arbitration offers to its participants a dispute resolution mechanism that, on balance, can make it quite preferable to the judicial

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[8] *available at* http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3#Time

system. Burdening this cost-effective, streamlined system with a pre-arbitration mini-trial on arbitrability in every case would eradicate its benefits. When the parties clearly and unmistakably have agreed that an arbitrator would rule on arbitrability, adding that burden seems particularly inappropriate.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-497

IN THE
SUPREME COURT OF THE UNITED STATES

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ALLIANCE FOR JUSTICE, ASIAN AMERICAN JUSTICE CENTER, CONSTITUTIONAL ACCOUNTABILITY CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, Alliance for Justice, Asian American Justice Center, Constitutional Accountability Center, National Partnership For Women & Families, and National Women's Law Center submit this brief with the consent of the parties[1] in support of Respondent Jackson and the proposition that courts should decide the threshold issue of the enforceability of an arbitration agreement.

Amici represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. An individual's ability to seek redress in court for unlawful discrimination is critical to the eradication of discrimination in the workplace. Although the court has held that such discrimination claims may be subject to arbitration by agreement, courts must still assess threshold challenges to the validity of specific agreements. This ensures that employees are not forced to arbitrate if they have not meaningfully agreed to do so or if the terms of the agreement are unconscionable.

Fuller statements of interest for all *amici* are included in the appendix to this brief.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

As the Court has recognized, "ameliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority.'" *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976). Laws such as 42 U.S.C. § 1981, the statute upon which Antonio Jackson relies, were intended to secure this essential national policy. Federally-guaranteed civil rights cannot be adequately protected if employees are subject to unconscionable arbitration terms. Thus, in response to well-founded claims of unconscionable arbitration provisions, courts must determine the limited, threshold issue of the enforceability of the arbitration agreement. Particularly when federally-protected civil rights are at stake, courts must ensure that the parties entered into a valid arbitration agreement prior to compelling arbitration.

The Federal Arbitration Act ("FAA") requires, and the Supreme Court has recognized, that a court may not compel arbitration of any dispute until it is satisfied that a valid arbitration agreement exists. Therefore, courts, not arbitrators, should fulfill the statutory duty set out in the FAA to ensure that the parties entered into an enforceable agreement to submit claims to arbitration.

Permitting courts to make this threshold determination furthers the congressional intent to ensure an adequate forum for civil rights claims and to provide remedies for unlawful discrimination. History shows that arbitration agreements in the employment context have all too often been

unconscionably biased. Courts should ensure that civil rights claimants have access to federal courts unless they have meaningfully agreed to an alternative forum, particularly in cases such as those arising under Section 1981 and other statutes that were expressly crafted to ensure fair tribunals for victims of discrimination. Courts should undertake such threshold review of arbitration clauses pursuant to their traditional role of policing unconscionability in contracts. This limited review also serves to enhance the legitimacy and credibility of the arbitral process. Allowing courts to play this limited role will not result in a flood of litigation. Litigation will occur only on the basis of well-founded claims of unconscionable terms or invalid arbitration agreements.

ARGUMENT

I. WHEN ADDRESSING CLAIMS OF UNCONSCIONABILITY IN AN AGREEMENT THAT APPEARS TO SUBMIT THE ISSUE OF ARBITRABILITY TO THE ARBITRATOR, THE COURTS SHOULD STILL FULFILL THEIR STATUTORY DUTY TO ENSURE THERE IS AN ENFORCEABLE AGREEMENT TO DO SO.

A. The Court and Congress have recognized that the right to be free from unlawful workplace discrimination can be subject to arbitration, but courts should determine whether an arbitration agreement should be enforced in the face of a claim of unconscionability.

The Court has long recognized the paramount importance that Congress has attached to each individual's right to be free from invidious discrimination.[2] This national principle stems from

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[2] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA "reflects a societal condemnation of invidious bias in employment decisions" in a case brought by an individual employee); *Franks*, 424 U.S. at 779 ("[A]meliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority'"); *NAACP v. FPC*, 425 U.S. 662, 665 (1976) (recognizing that "the elimination of discrimination from our society is an important national goal").

an intent to "eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.'" *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986) (internal citations omitted). To overcome this history of workplace discrimination based upon characteristics such as race, sex, and age, statutes such as Section 1981, the ADEA, and Title VII allow individuals to proceed to court to protect their rights against employers. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"); Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"). By these statutory means, Congress has attempted to ensure that every person has the right to challenge and seek redress for unlawful workplace discrimination. While the Court has said that these vital rights can be subject to arbitration,[3] these rights cannot be adequately protected through arbitration if agreements to arbitrate, including the threshold issue of

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[3] *Amici* remain concerned that subjecting these important rights to arbitration based on pre-dispute, binding arbitration clauses maximizes the disparity in bargaining power between the parties, and leads to inequitable agreements at the expense of employees' right to be free from employment discrimination and in derogation of Congress's intent to rid the workplace of discrimination. Because of these concerns and the Court's repeated assertion that arbitration changes only the forum, not the substantive rights, *see Mitsubishi Motors Corp.* v *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."), it is even more critical that courts play a meaningful role to ensure there truly is a knowing, voluntary agreement to arbitrate these claims when the process is challenged as unconscionable.

arbitrability, are unconscionable.[4] Arbitration may be a useful tool only when there is truly an enforceable agreement and the agreement to arbitrate is knowing and voluntary.[5] As the Court and Congress have recognized, this must be the starting point for all inquiries into whether an

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[4] The term "unconscionability"can have a broad meaning. One early attempt to capture its meaning defined it as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449 (D C Cir 1965); *see also Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 479 (Cal. Ct. App. 1 Dist. 1996) ("While the term 'unconscionability' is not defined by statute, the official comment explains the term as follows: 'The basic test is whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . .'" (citation omitted)); *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N J. 1960) ("[T]he courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other.").

[5] As the Court noted in *First Options of Chicago, Inc. v. Kaplan*, arbitration agreements often contain several types of agreements. 514 U.S. 938, 945 (1995). These can include agreements to arbitrate the merits of the dispute and agreements about who should decide the question of what is covered by the arbitration agreements. *Id.* The issue currently before the Court deals with the second issue—who decides whether there is an agreement to arbitrate. Though the meaning of arbitrability is confusing and has not been clearly defined by the Court, this brief refers to arbitrability as "whether under applicable law a dispute is subject to arbitration at all." Resp. Br. 24 n.4. Accordingly, there must first be a determination that there was an actual enforceable agreement for arbitrability to be determined by the arbitrator If there is such an agreement, issues relating to the enforceability of the merits arbitration are properly determined by the arbitrator.

employee has effectively waived the right to bring these important federal claims before a federal court and agreed to defer instead to an arbitrator. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("[A] compulsory submission to arbitration cannot precede judicial determination that the [arbitration agreement] does in fact create such a duty."); *see also* A Bill Relating Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions on Agreements for Arbitration of Disputes; Hearing on S. 4213 and 4214 Before S. Comm. on the Judiciary, 67th Cong. 5 (1923) (Statement of Sen. Walsh) ("[T]he court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law, and consequently . . . it seems to me you are obliged, to go to court.").

While not the issue confronting it, a majority of the Court in *First Options of Chicago, Inc. v. Kaplan*, suggested in dicta that parties may agree to assign the issue of arbitrability to an arbitrator, but only if there is "'clea[r] and unmistakabl[e]' evidence" that the parties intend for an arbitrator to decide this threshold issue.[6] 514 U.S. 938, 944 (1995). *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) ("In certain limited circumstances, courts assume that the parties

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[6] As discussed in detail in Respondent's brief, this language only addresses the limited issue of the parties' agreement regarding the scope of what the arbitrator can decide, as opposed to issues of validity and enforceability of the agreement to arbitrate. *See* Resp. Br. 26-28.

intended courts, not arbitrators, to decide a particular arbitration-related matter . . . [these limited situations] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all . . ."); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide.") (citations omitted). To the extent the language in *First Options* can be read to provide the parties *some* latitude to agree as to who decides arbitrability, the Court surely could not have intended to divest the courts of *all* ability to make threshold determinations as to whether there was a valid agreement as to who decides arbitrability and to determine whether these agreements are unconscionable. To do so would run counter to the express language of the FAA and would undermine the integrity and credibility of the arbitral forum.

In fact, the Court has recognized repeatedly that courts should play a role to ensure fairness in the arbitration process and to ensure that there is an enforceable agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (citing *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987)). "Courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Mitsubishi Motors Corp.*, 473 U.S. at 627; *see also Gilmer*, 500 U.S. at 33 (stating that "[a] claim of unequal bargaining power is best left for resolution

in specific cases").

The Court and Congress have recognized a federal policy in favor of arbitration.[7] However, there is no presumption that "matters which go beyond the application of contract terms are subject to arbitration." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998). The courts can liberally construe the scope of an agreement only where two parties have entered into a valid, *consensual* agreement to arbitrate. This is especially true when determining whether there is an enforceable agreement to have the arbitrator decide threshold issues regarding arbitrability, since there is a presumption that the courts will decide this issue.[8]

Even assuming, *arguendo*, that the Court

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[7] Section 118 of the Civil Rights Act of 1991 provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. *See also Wright*, 525 U.S. 70; *Howsam*, 537 U.S. at 83.

[8] Although the Court has recognized a "'federal policy favoring arbitration agreements,'" *Howsam*, 537 U.S. at 83 (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)), "it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* (*citing AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raised a 'question of arbitrability' for a court to decide." *Id.* (*citing First Options*, 514 U.S. at 943-46).

intended the clear and unmistakable evidence standard to apply to purported assignments of questions of unconscionability and validity of the employment arbitration agreement, given the Court's prior decisions, it is simply not possible that the Court envisioned lower courts playing a mere ministerial role of simply looking at whether the language was as clear, as Petitioner maintains. Pet. Br. 18-19. Rather, as evidenced by the Court's decisions in the employment context, courts should determine whether there is an enforceable agreement to have the arbitrator decide these threshold issues before the matter is sent to arbitration.

B. The Federal Arbitration Act requires, and the Supreme Court has recognized, that a court may not compel arbitration of any dispute until it is satisfied that a valid arbitration agreement exists.

The FAA mandates that courts play this threshold review role as to whether the parties entered an enforceable agreement to have the arbitrator decide the threshold issue of arbitrability. Section 4 of the FAA states, in relevant part, that a court may not compel arbitration of any dispute until it is "satisfied that the *making of the agreement for arbitration* . . . is not in issue." 9 U.S.C. § 4 (emphasis added). Upon such a finding, a court may then "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* Accordingly, the text of the FAA embodies the requirement that only valid arbitration agreements may be sent into binding arbitration.

See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) ("[I]f an issue . . . goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it [pursuant to Section 4 of the FAA]."); *see also* Resp. Br. Parts I.A & I.B.

Petitioner suggests that this section of the FAA provides "direct textual support" for the argument that parties may structure arbitration agreements "to commit particular issues to the arbitrator." Pet. Br. 16. Petitioner misconstrues Section 4 of the FAA by overlooking the requirement that a court may only compel parties to proceed to arbitration *after* a finding that the *making of the agreement for arbitration* is not in issue. Once a court is satisfied with the formation of the arbitration agreement, then parties may proceed to arbitration.

Section 2 of the FAA also requires that only valid arbitration agreements may be sent to arbitration. Section 2 states that an agreement to arbitrate shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, the FAA recognizes that courts may make an initial determination as to whether an arbitration agreement is valid before sending parties into binding arbitration. *See Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478-79 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . . Arbitration under the Act is a matter of consent, not coercion . . . .").

Permitting courts to determine the validity of

an arbitration agreement does not contravene the FAA's goal of avoiding the expense or delay of litigation. Rather, allowing courts to make this determination at the initial stages of litigation avoids the expense and delay incurred through the process of appeal.[9] Accordingly, an initial determination of unconscionability by the court does not undermine the FAA's goals; instead, it furthers the policy of Section 2 of the FAA by ensuring that claims are properly submitted to an arbitrator when—and only when—the parties entered a valid and enforceable agreement to arbitrate.[10]

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[9] Having courts perform this threshold review in determining the validity of an arbitrability agreement also ensures that these claims are reviewed at the outset of litigation, rather than through the extremely restrictive standard of review applicable on appeal, which has the potential to mask errors in the arbitrator's decision of arbitrability. *See First Options*, 514 U.S. at 942 (noting the importance of whether an issue goes initially to a court versus an arbitrator because "the court will set that decision aside only in very unusual circumstances"); *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 120 (2d Cir. 1991) ("It is well-settled that judicial review of an arbitration award is narrowly limited"). Indeed, in a recent argument before the Court, Justice Breyer characterized the standard of review as being so narrow that the arbitrator's decision must be upheld unless it is from Mars. *See* Transcript of Oral Argument at 9-10, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, No. 08-1198 ("[W]hen the arbitrator says something, unless it's in Marrs [sic], follow it.")

[10] Because the determination of unconscionability is analogous to a jurisdictional determination, it is improper to grant an arbitrator more power than judges possess at the district court level. Both determinations affect whether the court, or the arbitrator, can properly exercise control over the parties. While a district court's ruling on matters of jurisdiction is subject to de novo review by a court of appeals, the review of an arbitrator's decision is subject to extremely limited review. *See*,

Moreover, the Court has stated repeatedly that, because arbitration is a matter of contract, whether a valid agreement to arbitrate exists is an issue that should be determined at the outset by the courts.[11] *See, e.g., United Steelworkers of Am. v. Warrior & Golf Navigation Co.*, 363 U.S. 574, 582 (1960) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("The question of arbitrability . . . is undeniably an issue of judicial determination."); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."). While arbitration is an avenue through which to resolve disputes quickly and efficiently, parties must first have agreed to submit those disputes to arbitration. *See First Options*, 415 U.S. at 943. Accordingly, "[c]ourts should not assume that . . . parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citations omitted).

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e.g., Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 857 (5th Cir. 2003); *see also* 9 U.S.C. § 10.

[11] However, as discussed *infra*, the Court appears to permit parties to agree to have an arbitrator decide threshold issues going to the scope of the arbitration clause if there is "'clea[r] and unmistakabl[e]' evidence" of their intent to do so. *First Options*, 415 U.S. at 944 (citations omitted).

C. Adopting Petitioner's proposed rule of law would lead to absurd results.

When considering a motion to compel arbitration, the FAA requires that the court be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Similarly, before a court can stay a proceeding where the matter may be subject to arbitration, the court must be "satisfied that the issue . . . is referable to arbitration under such an agreement." *Id.* § 3. The Court has repeatedly stated that the FAA mandates arbitration only where the parties entered an enforceable agreement to arbitrate. *See First Options*, 514 U.S. at 944.

The over-reaching arbitration clause drafted by Petitioner and offered as a non-negotiable condition of employment seeks to divest the courts of the very power needed to ensure that arbitration occurs only on the basis of an enforceable agreement. Petitioner's arbitration clause provides that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have *exclusive authority* to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." Pet. Br. 4-5. Petitoner argues that because the plain language of the agreement allocates "exclusive authority" to the arbitrator to determine the validity of the arbitration agreement, under a plain reading of this clause, the court lacks the authority to determine the validity of the agreement. However, the FAA requires that a court

make this determination before it can send claims into binding arbitration. *See* 9 U.S.C. § 4. In short, the courts must do more than look at words on paper.

Petitioner's proposed rule of law contravenes the requirements of the FAA and misconstrues the Court's holdings in *AT&T* and *First Options*. Petitioner insists that a signed arbitration clause that contains language purporting to delegate arbitrability to an arbitrator is all that is needed to constitute "clea[r] and unmistakabl[e]" evidence that the parties have agreed to arbitrate the agreement's validity. *See* Pet Br. 12. This ignores the Court's language in *First Options* that "[c]ourts should not assume that . . . parties agreed to arbitrate arbitrability unless there is *'clea[r] and unmistakabl[e]'* evidence that they did so." *First Options*, 415 U.S. at 944 (citations omitted) (emphasis added). In order for the Court's clear and unmistakable language to have any meaning, the courts must look beyond the language to ensure a valid agreement exists.

Assume Mr. Jackson claimed that although his name was on the agreement, he never signed it. Instead, the employer simply wrote each employee's name on these agreements. Petitioner could not credibly argue that just because there is clear and unmistakable language sending all formation issues to the arbitrator, that the courts would have no role in deciding whether there truly was an agreement to arbitrate arbitrability. Similarly, a well-founded claim of unconscionablity, particularly procedural unconscionability, goes to whether there was actually a meaningful and enforceable agreement to

arbitrate.

Thus, where a claim of unconscionability creates a question as to whether there is an enforceable knowing and voluntary agreement, regardless of language in the agreement purporting to assign the question to the arbitrator, the court should determine whether such an agreement exists. Allowing courts to make this threshold determination adheres to the procedures established in the FAA by ensuring that the parties have in fact agreed to submit to arbitration.

D. Permitting courts to make limited threshold determinations regarding validity and enforceability of arbitration clauses furthers Congress's intent to ensure an impartial forum for civil rights claims and to ensure meaningful remedies for unlawful discrimination.

To fulfill congressional intent to protect vulnerable populations from unlawful discrimination, courts should determine the threshold issue of arbitrability. This role is especially important when federally-protected civil rights are at stake. The fundamental purpose of civil rights laws is to secure the right of all people to be free from invidious discrimination. *See, e.g. NAACP v. FPC*, 425 U.S. 662, 665 (1976). The Court has made clear that the federal civil rights laws reflect a fundamental national policy to end discrimination and to heal the deep national wounds created over the course of centuries. *See generally*

Franks, 424 U.S. at 779. Congress envisioned the courts playing a key role in ensuring that victims of discrimination have a reasonable forum to obtain relief for civil rights violations. *Local 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 465 (citing *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 465 (1975)).

This is particularly evident with respect to the Civil Rights Act of 1866, including Section 1981, which was intended to ensure the fair administration of justice. The framers of this Reconstruction Act sought to "eliminate racial and political prejudice in the administration of civil and criminal justice in the State courts, and provide an alternative system of civil and criminal justice when individuals could not enforce or were denied their civil rights in the state courts." Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 581 (1989).[12] The framers of the Act knew that they could not achieve their goal of rooting out discrimination without an effective enforcement mechanism in a fair tribunal. *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (statement of Sen.

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[12] Noting the virtual impossibility of an emancipated slave or Unionist obtaining a fair trial in former slave-holding states, Senator Sherman spoke in support of the Act, observing, "To say that a man is a freeman and yet is not able to assert and maintain his right in a court of justice is a negation of terms." Cong. Globe, 39th Cong., 1st Sess. 41 (1866). *See generally* Report of the Joint Committee on Reconstruction Pt. II, 240 (1866) (noting that former slave owners were inserting into contracts "tyrannical provisions" that prevented freedmen from exercising their fundamental rights).

Trumbull) (arguing that the civil rights statute would only have force if it also created a clear mechanism of judicial enforcement).

To the extent that employment discrimination claims are subject to arbitration, the Court must balance the national policy favoring voluntary arbitration with the national policy to eliminate discrimination in the workplace. In order to effectively balance these public interests, the courts must ensure that employees' federally-protected civil rights are subject to arbitration only when a valid arbitration agreement exists. When the validity of the arbitration agreement is in question, courts should determine whether the agreement should be enforced in the face of a claim of unconscionability. Whether the arbitration clause is unconscionable constitutes a threshold issue that goes to the essence of whether there is a valid and enforceable agreement. *See* Resp. Br. 21-22.

II. PERMITTING COURTS TO MAKE THE LIMITED THRESHOLD DETERMINATION REGARDING ARBITRABILITY ENHANCES THE INTEGRITY AND CREDIBILITY OF ARBITRATION.

Increasingly, employers require employees to sign arbitration clauses as a condition of employment.[13] These clauses often are included on

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[13] *See, e.g.*, Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581, 586-88 (2004) (presenting empirical evidence of growth in mandatory arbitration for employment disputes following

application forms or presented soon after the employment relationship is formed.[14] In order to get or keep a job, individuals in some cases must waive access to the courts before any dispute arises. *See, e.g., EEOC. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) (employee lost job offer when he refused to agree to arbitrate). Typically, employees do not obtain legal advice or engage in negotiation over the terms drafted by employers. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171-72, 1179 (9th Cir. 2003) (arbitration provisions allowed only the employer to change the terms of the agreement unilaterally, and the employer presented the agreement on a "take-it-or-leave-it" basis). In short, most employees have little choice but to assent to the arbitral forum under terms set out by the employer.

In light of these imbalances in bargaining power and the potential for abuse, it becomes all the more critical to ensure that courts decide the threshold agreement of arbitrability. Putting the threshold question of arbitrability to courts protects parties from being bound to unconscionable arbitration agreements and ensures that claims taken to arbitration are properly before the arbitrator.

Gilmer). Today, an estimated 30 million workers are subject to mandatory arbitration clauses. National Employment Lawyers Association, "Data Points: Prevalence of Mandatory Arbitration," October 2007, *available at* http://judiciary.house.gov/hearings/pdf/Ventrell-Monsees071025.pdf.

[14] *See, e.g.*, EEOC Notice No. 915.002: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997).

A. Permitting courts to make the initial determination of arbitrability furthers the public interest by enhancing legitimacy and credibility of the arbitral process.

The benefits of assigning arbitrability to the courts extends beyond the individual parties to arbitration agreements or the classes of persons most often bound by mandatory arbitration.

Allocating questions of arbitrability to the courts eliminates the appearance of impropriety that may arise when an arbitrator is called upon to assess whether he or she has jurisdiction to hear the underlying claim. Additionally, if a court determines that a challenged agreement to arbitrate is enforceable, the court's decision legitimizes subsequent arbitration proceedings.

This threshold review by the courts is necessary to instill confidence in the party opposing arbitration that the process is legitimate. The Court has recognized "the question [of who decides arbitrability] . . . has a certain practical importance" in all cases because an arbitrator's decision is subject to only limited judicial review. *First Options*, 514 U.S. at 942. Thus "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a *critical* difference to a party resisting arbitration." *Id.* (emphasis added).

The Supreme Court recently recognized the importance of avoiding even the appearance of impropriety in the judicial context, observing that

"[a]lmost every State . . . has adopted the American Bar Association's objective standard" mandating that judges avoid not only impropriety, but "the appearance of impropriety." *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (quoting ABA Annotated Model Code of Judicial Conduct Canon 2 (2004)). The Court went on to observe that "[t]hese codes of conduct serve to maintain the integrity of the judiciary and the rule of law" as the "'power and prerogative of a court to [resolve disputes] rest, in the end, upon the respect accorded its judgments,'" which "'depend in turn upon the issuing court's absolute probity.'" *Id.* (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Similarly, the perceived impartiality of arbitrators is critical to acceptance of their authority to issue binding decisions on matters otherwise left to the judiciary.

B. Courts should undertake a meaningful threshold review pursuant to their traditional role of policing unconscionable provisions in arbitration clauses.

Courts have performed a vital role in policing attempted abuses of arbitration by rejecting arbitration clauses found to be unconscionable. Courts have refused to compel arbitration on the basis of unconscionable provisions that seek to unreasonably control the arbitrator selection process, impose high costs, limit discovery, or limit the availability of remedies provided by law, etc. *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (disapproving provision requiring loser to pay the opponent's attorneys' fees because

the employees could not meet such a financial burden); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (disapproving provision allowing employer "unrestricted control" over the selection of a panel of three arbitrators); *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1994) (disapproving provision that purported to forfeit statutorily-mandated right to recover damages); *Hulett v. Capitol Auto Group, Inc.*, 2007 WL 3232283 (D. Or. Oct. 29, 2007) (striking unconscionable limits on discovery).

Allegations of fundamental unfairness and bias in the design of an arbitration system go beyond the "generalized attacks" on neutrality resting on general "suspicion of arbitration" that the Court has rejected. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 78, 89-90 (2000); *Gilmer*, 500 U.S. at 30 (citing protection of 9 U.S.C. § 10(b)). Rather, specific allegations of bias and fundamental unfairness in the arbitration process rise to the level of rendering an arbitration contract substantively unconscionable. In such cases, neither logic nor efficiency recommends withholding judicial review of the allegation of fundamental bias until after the conclusion of the allegedly defective arbitration proceedings. Nor does the law so require. Rather, the FAA authorizes the courts to address this issue upfront and without any deference to the arbitrator when considering the validity and enforceability of the agreement to arbitrate under state unconscionability doctrine. *Cf. McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (rejecting argument that under *Gilmer*, allegations of arbitrator bias should only be considered in subsequent review of the arbitration decision, and

explaining that "[w]hen the process used to select the arbitrator is fundamentally unfair . . . there is no need to present separate evidence of bias or corruption in the particular arbitrator selected.").

The question of "who decides" claims that an arbitration agreement is unenforceable due to unconscionability raises practical and policy concerns. Claims of unconscionability in the arbitration context frequently focus on fundamental unfairness of the system of dispute resolution provided for in the agreement. In such cases, forcing the question of unconscionability into the very decision-making system alleged to be unconscionably unfair or inaccessible makes little sense and raises "the most potent" public policy concerns. *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009).

In the context of employment agreements and other contracts of adhesion, claims of such unconscionable bias are common and have been recognized by courts. In the prominent case of *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, for example, an employee brought suit against Hooters for sexual harassment and Hooters moved to compel arbitration based on its mandatory arbitration agreement with employees. *Id.* at 935-36. The Fourth Circuit affirmed the district court's denial of the motion, finding the agreement unenforceable because the rules for arbitration, "taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceedings." *Id.* at 939. The court discussed various one-sided aspects of the arbitration procedures, including a rule allowing Hooters to change the rules of arbitration "in whole or in part" whenever it wished

and "without notice" to the employee. *Id.* The court also focused in particular on the "mechanism for selecting a panel of three arbitrators," which gave Hooters "unrestricted control" over the composition of the arbitration panel without any protections against bias or conflict of interest. *Id.* The court found that such design was "crafted to ensure a biased decisionmaker." *Id.*

Unfortunately, the unconscionably-biased system of arbitration at issue in *Hooters* is not unique. In similar cases, courts have rejected employers' attempts to stack the deck by controlling the selection of the arbitrator or promulgating one-sided procedural rules. *See, e.g., Murray v. UFCW Int'l, Local 400*, 289 F.3d 297, 303-04 (4th Cir. 2002) (refusing to enforce arbitration agreement "utterly lacking in the rudiments of evenhandness" under unconscionability doctrine because the employer retained complete control of the selection of arbitrators, with no protections against bias or conflict of interest); *McMullen*, 355 F.3d at 494 (holding unconscionable an arbitration provision that was "fundamentally unfair" in that it gave employers excessive control over the process and selection of arbitrators); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 944-49 (N.D. Ind. 2000) (denying motion to compel arbitration because the procedure for selecting the arbitration panel ensured that two of the three arbitrators would have biasing ties to the employer); *see also* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005) (observing that "companies have selected arbitrators who might clearly be expected to be biased, such as a representative of management of the company

against whom a claim might be made"). If courts abdicate their role in considering such challenges to arbitration agreements, the incidence of such abuses will likely increase.

The second category of claims that is uniquely inappropriate for assignment to arbitral authority includes claims that the arbitration agreement is substantively unconscionable because the arbitral forum that it establishes is inaccessible to one of the parties. If the court enforces an assignment of the unconscionability question to the arbitrator, the party may be left without access to any forum at all, judicial or arbitral, to have both the question of unconscionability and the underlying claim heard. In such cases, even the FAA's promise of limited judicial review of the arbitral decision offers no relief. Without access to the arbitral forum, there will be no decision of which to seek review. This would be particularly troubling for claims, like Mr. Jackson's, that are brought pursuant to Section 1981, which was specifically crafted to ensure that civil rights claimants have access to justice and a fair tribunal.

The most commonly alleged barrier to access to arbitration is cost. Courts have considered challenges regarding the total potential costs a complaining party may incur in the course of arbitration, which could be so high as to render pursuit of a claim devastating, *see, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (holding that an arbitration provision requiring the loser to pay the opponent's attorneys' fees was substantively unconscionable with respect to the discharged refinery workers because they could not

meet such a financial burden), as well as claims regarding upfront costs of entry to arbitration. *See, e.g., Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (declining to enforce an arbitration agreement with a cost-splitting provision and requiring an upfront deposit of $6,000). Both types of claims could present unconscionable and insurmountable barriers to arbitration, even arbitration of the threshold question of unconscionability. Another barrier to access that has been dismantled in some states pursuant to the unconscionability doctrine is the selection of a distant arbitral forum. *See, e.g., Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566-68 (Cal. Ct. App. 1993) (holding unconscionable an arbitration clause that required California consumers to arbitrate any disputes in Minnesota, where the cost of obtaining a hearing in such forum might approach the amount at issue in the underlying dispute). Depending on the circumstances of the parties, a distant arbitral forum may like a high upfront cost render the arbitral forum inaccessible. Clearly, allegations of such unconscionability should be resolved by a court to ensure reasonable access to the arbitral forum. Congress did not intend to create a regime wherein employees are pressured to waive access to the courts in exchange for illusory access to arbitration.

For all of the above reasons, courts should decide well-founded claims of unconscionability at the outset, rather than waiting until after arbitrators rule on the unconscionability claim and the merits of the underlying claim. A contrary ruling could add significant and unnecessary delays, inefficiencies, and costs, by inviting duplicitous

proceedings.

III. PERMITTING COURTS TO DETERMINE THRESHOLD CLAIMS OF UNCONSCIONABILITY WILL NOT CAUSE A FLOOD OF LITIGATION.

Courts should determine the threshold legal issues regarding whether there is actually an enforceable agreement as to who decides the issue of arbitrability. Indeed, Petitioner, citing favorably to *Howsam*, acknowledges that courts traditionally have the jurisdiction to determine threshold issues of arbitrability, including issues of unconscionability. Pet. Br. 21-22 ("Inasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide.").[15] Petitioner and its *amici* concede the courts have a role to play in determining threshold issues of arbitrability; however, Petitioner and its *amici* appear more concerned about the level of evidence that should be required for the courts to play this threshold review role. They repeatedly characterize the evidence here as "merely a claim," Pet. Br. at 26, and refer to "*any* claim of unconscionablity, no matter how weak," *id.* at 22, "a mere allegation of unconscionability," *id.* at 24, and "Jackson merely alleges . . ." *Id.* at 26 n.9. They also raise an unfounded concern that a flood of litigation will result from baseless allegations of unconscionability. *See* Brief for Pacific Legal

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[15] Petitioner's supporting *amici* also seem to concede there is some role for the courts to play in determining threshold issues. *See* Emp. Adv. Council Am. Br. at 9; Br. in Support of the Petition for a Writ of Certiorari by Am. Pacific Legal Foundation at 6.

Foundation as Amicus Curiae Supporting Petitioner in Support of Granting a Writ of Certiorari, 6-8; Pet. Br. at 29-34; *see also* Chamber of Commerce Am. Br. at 13.

The Court already has anticipated this concern and has repeatedly noted that claims must be "well-founded," *McMahon*, 482 U.S. at 226; *Gilmer*, 500 U.S. at 33, and "well-supported" to trigger the courts' gate-keeping function. *Rodriquez v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) ("[Section] 2 of the Arbitration Act also allows the courts to give relief where the party opposing arbitration presents well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.") (internal quotations and citations omitted); *Mitsubishi*, 473 U.S. at 627. Trial courts are well-equipped to determine whether the party has a well-founded claim; indeed courts have long made such threshold determinations. Baseless allegations of unconscionability will not lead to litigation and will not flood the courts.

If there is a concern about the quantum of proof of unconscionablity in this case, it is within this Court's discretion to remand this case for the purpose of determining whether Mr. Jackson's claim meets the standard articulated by the Court required to trigger review of threshold legal issues by a court.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici*:

Organizations

The Lawyers' Committee for Civil Rights Under Law is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee seeks to ensure that the goal of civil rights legislation to eradicate discrimination is fully realized, and is concerned in this case with the potential negative impact on a plaintiff's ability to obtain relief for valid civil rights claims. To this end, the Lawyers' Committee has filed amicus briefs opposing limitations on access to relief for victims of discrimination and attempting to ensure that arbitration allows for meaningful vindication of federally-protected rights in a number of cases including *Stolt-Nielsen S.A., et al. v. Animalfeeds International Corp.*, 129 S. Ct. 2793 (2009); *14 Penn Plaza LLC, et al. v. Pyett et al.*, 129 S. Ct. 1456 (2009); *Green Tree Fin. Corp. v. Bazzle et al.*, 539 U.S. 444 (2003); *EEOC v. Waffle House Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime*

Service Corp. et al., 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The resolution of this case will significantly affect the extent to which the Lawyers' Committee can protect the rights of its clients.

Alliance for Justice ("AFJ") is a national association of over 100 organizations dedicated to advancing justice and democracy. For more than 30 years, AFJ has been leading the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil, and women's rights, children, senior citizens, and other groups. AFJ is premised on the belief that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives. In this case, AFJ is particularly concerned with unconscionable arbitration provisions that limit plaintiffs' ability to pursue valid civil rights claims.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in litigation, public policy, advocacy, and community education. AAJC and its affiliates have a long-standing interest in protecting individuals' civil rights in the employment setting. This interest has resulted in AAJC's participation in a number of amicus briefs before the courts on the issues of employment discrimination and unfair employment

practices where the parties have unequal bargaining power.

Constitutional Accountability Center ("CAC") is a nonprofit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history, including preserving access to equal justice and impartial courts. CAC has a particular interest in the text and history of the Reconstruction Amendments, and the statutes passed to enforce these Amendments, as demonstrated by the amicus briefs CAC has filed in *Caperton v. Massey*, 129 S. Ct. 2252 (2009); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); and *McDonald v. City of Chicago*, *petition for cert. filed*, 130 S. Ct. 48 (U.S. Sept. 30, 2009) (No. 08-1521).

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination, and has filed numerous amicus curiae briefs in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex

discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous amicus briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.

AMICUS CURIAE BRIEF

No. 09-497

In The Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

National Association of Consumer Advocates ("NACA") is a nationwide, non-profit corporation whose over 1,000 members are private and public sector lawyers, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the ethical and professional representation of consumers. Towards this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised second edition of which is published at 255 F.R.D. 215 (2009).

NACA also is dedicated to promoting justice for all consumers, and has furthered this interest by appearing as *amicus curiae* in support of consumer interests in cases in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumers in *Cuomo v. Clearing House Ass'n, LLC*, 129 S. Ct. 2710 (2009), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), and *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), among other cases. In these cases, NACA advocated

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

for access to justice for consumers by opposing misuses of mandatory arbitration clauses and expansive assertions of federal preemption doctrines that restricted or extinguished consumers' rights.

This case presents a convergence of mandatory arbitration and federal preemption issues with potentially enormous implications for the rights of consumers, employees like Mr. Jackson, and other persons who face mandatory arbitration clauses in their daily lives. Rent-A-Center and its supporting *amici* urge the Court to hold that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, prohibits federal and state courts from deciding a challenge to the validity of an arbitration clause if the clause states that an arbitrator shall decide disputes about its validity. By making arbitration clauses self-enforcing, this new rule would preempt state-law requirements for the existence and enforceability of contracts, notwithstanding the Court's recognition in *Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265 (1995), and *Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681 (1996), that such state laws would continue to apply to "protect[] consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281.

NACA is gravely concerned that, if this position were adopted, there would be no law limiting a company's power to strip consumers and employees of the right to go to court and of the ability to vindicate their legal claims in *any* forum. This is because a self-enforcing arbitration clause would require courts to

give effect to its terms even if they impose prohibitive barriers such as the arbitral forum fees that Jackson challenges here, distant venue requirements, and even designations of arbitral forums whose financial ties to certain industries make a mockery of the notion of arbitration as a system for providing justice. By giving such provisions effect irrespective of any laws prohibiting them, the Court would severely diminish the rights of employees and consumers.

NACA thus submits this brief in support of Jackson urging the Court to reject Rent-A-Center and its *amici*'s proposed interpretive rule authorizing self-enforcing arbitration clauses and the far-reaching consequences that would flow from this. Instead, the Court should affirm the decision below holding that a dispute over whether an arbitration clause is unconscionable or otherwise unenforceable is a threshold matter for a court to decide under the FAA by applying state contract law.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Ninth Circuit correctly held below that, under the FAA, a court must decide a threshold dispute over whether an arbitration clause is enforceable or is unconscionable under applicable state contract law despite the clause's provision for an arbitrator to decide its validity. In urging reversal, Rent-A-Center and its *amici* ask the Court to hold that the FAA allows the

drafter of a mandatory arbitration clause to make the clause self-enforcing simply by writing in that an arbitrator, not a court, shall decide disputes over validity.

This argument is contrary to the letter and purposes of the FAA. The Act provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The proposed interpretive rule would make arbitration clauses enforceable *notwithstanding* such grounds for revocation. Moreover, the Court long has recognized that § 2's purpose is to "'place such agreements upon the same footing as other contracts.'" *Allied-Bruce*, 513 U.S. 271 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)) (internal citation omitted). The proposed interpretive rule would do just the opposite, creating a federal common law rule of self-enforcement that applies only to arbitration clauses and overrides the state-law requirements applying to all other contracts. Jackson has thoroughly demonstrated how the proposed rule does not comport with the FAA, and NACA joins his arguments in full.

The Court also should reject this proposed interpretive rule because it would, despite the absence of any express command by Congress, preempt much if not all of what remains of state contract law after the Court's prior decisions finding preemption by the FAA. In *Allied-Bruce*, 20 state attorneys

general and a national civil rights organization urged the Court to reconsider its ruling in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA applies in state courts and preempts state laws restricting arbitration of claims therein. One of their arguments was that a narrower application of the Act "would better protect consumers asked to sign form contracts by businesses." *Allied-Bruce*, 513 U.S. at 280. In rejecting this argument, the Court explained that § 2 of the Act already "gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision[,]" since "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* at 281 (quoting 9 U.S.C. § 2); *see also Doctor's Assoc's*, 517 U.S. at 686 ("Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

This is precisely the type of contract defense that Jackson asserts here. Rent-A-Center's argument that the FAA bars him from doing so *before its arbitration clause is enforced against him* would betray the promise of *Allied-Bruce* and *Doctor's Associates* by preempting the application of state contract law as a condition for enforcing such clauses. This would fundamentally transform the FAA into a sweeping field-preemptive statute leaving no external law in

place, despite the absence of any directive for this by Congress. Unlike the state laws at issue in those cases, which were deemed to conflict with the FAA because they directly restricted arbitration clauses through rules targeting the very requirement of arbitration, Jackson's argument here that Rent-A-Center's arbitration clause is unconscionable based on its mandatory and one-sided terms employs a generally applicable state-law standard. *See, e.g.*, *Tandy Comp. Leasing v. Terina's Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989). By prohibiting application of this or any other state-law standard as a requirement for enforcing an arbitration clause, Rent-A-Center and its *amici*'s arguments would leave these clauses subject to no law whatsoever, save for the proposed FAA requirement of a piece of paper with the words "arbitrate" and "validity disputes" written on it. The Court should reject this argument as irreconcilable with the FAA.

Rent-A-Center's *amici* do not deny this effect of their proposed interpretive rule, arguing instead that federal and state courts cannot be trusted to apply state contract law because of their alleged hostility towards arbitration. *See, e.g.*, Brief of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Petitioner (hereafter, "Chamber Brief") at 12-27. They contend that studies, including their own, show that a large number of recent court decisions applying the state-law doctrine of unconscionability involve arbitration clauses, and that this demonstrates that federal and state courts are hostile to

arbitration. *See id.* at 16-18. But these studies demonstrate nothing of the sort.

First, to the extent these studies rely on analysis of "federal appellate decisions" (*id.* at 17), they are skewed because the FAA allows direct interlocutory appeals from orders denying arbitration, 9 U.S.C. § 16(a)(1), but *prohibits* most appeals of orders compelling arbitration, 9 U.S.C. § 16(b)(1)-(4). Thus, cases where district courts enforce arbitration clauses never make it into the Chamber's "independent review" allegedly showing judicial hostility to arbitration.

Second, the Chamber ignores an obvious reason why parties and courts might apply state-law unconscionability arguments more often to arbitration clauses than to other types of contracts. In many federal circuits, this is the only external law that can apply to arbitration clauses. This is because these circuits, *including the court below*, have *expanded* the scope of preemption under the FAA so that arbitration clauses are governed *only* by the common law of contracts, *and all other state law is preempted*. While other types of contracts are regulated by statutes, such as those protecting consumers, employees, or small-business franchise owners against overreaching terms common to those settings, the Ninth Circuit and others have held that the FAA preempts these statutes. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) ("It is possible to construe the Supreme Court's holding in *Doctor's Assocs.* as being limited to state statutes that 'single out'

arbitration provisions, as opposed to statutes that affect both arbitration and litigation; however, the Court's reasoning is based on the principle that *only state law that addresses the enforcement of 'contracts generally' is not preempted by the FAA.*") (emphasis added). Thus, the court held that a state franchisee protection statute's prohibition against contracts placing venue out-of-state was preempted even though it did not target arbitration clauses. *Id.*; *see also Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (FAA preempts state consumer protection statute because it applies "only to consumer contracts"); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffee Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (FAA preempts franchisee protection statute because it "does not apply to all contracts and does not establish a generally applicable contract defense").

In these circuits, the FAA is deemed to preempt all state law except for the common law of contracts. Thus, individuals trying to challenge overreaching arbitration clause terms dictated by companies have no choice but to argue unconscionability. Yet, the Chamber ignores these courts' over-expansive preemption rulings in its rush to conclude that they are motivated instead by hostility towards arbitration.

In light of the foregoing, the Court should reject Rent-A-Center and its *amici*'s invitation to rewrite the FAA to make arbitration clauses self-enforcing, and thereby preempt whatever state law would

remain applicable to them. Instead, the Court should affirm the decision below as adhering to the letter and purpose of the FAA to place arbitration clauses on the same footing as other contracts in order to facilitate arbitration where it is warranted, while protecting parties against abusive impositions where it is not.

ARGUMENT

I. The FAA Does Not Preempt State Contract Law by Allowing Arbitration Clauses to Be Self-Enforcing.

Rent-A-Center and its *amici*'s proposed rule to make arbitration clauses self-enforcing would eliminate the state-law protection for consumers and employees that the Court recognized in *Allied-Bruce* and *Doctor's Associates*. Rent-A-Center urges the Court to hold that the FAA requires enforcement of any arbitration clause that says an arbitrator decides disputes about the clause's validity, notwithstanding a party's argument that the clause is unconscionable under non-discriminatory state law. This proposed rule, by making arbitration clauses enforceable based solely upon their own terms, would mark a drastic departure from the letter and purposes of the FAA, and transform the Court's prior recognition of implied conflict preemption under the Act into a sweeping field preemption regime that Congress never authorized.

In *Allied-Bruce*, the Court revisited its original holdings in *Southland Corp.* and *Perry v. Thomas*, 482 U.S. 483 (1987), that the FAA applies in state-court cases and preempts state laws that specifically prohibit or limit enforcement of arbitration clauses. Despite the request of 20 state attorneys general and other *amici curiae* to reverse these rulings, the Court did just the opposite. It reaffirmed the FAA's application in state courts and its preemption of state law prohibiting arbitration of claims, and arguably expanded the Act's reach by holding that it applies to the fullest extent allowed by Congress's power to regulate interstate commerce. *Allied-Bruce*, 513 U.S. at 272, 281.

In embracing the broadest possible application of the FAA, the Court recognized and tried to balance the interests of businesses and consumers. With respect to businesses, the Court emphasized in reaffirming *Southland*'s state-court and preemption ruling that, "in the interim, private parties have likely written contracts relying upon *Southland* as authority." *Id.* at 272. With respect to consumers, and by extension employees and other individual parties, the Court rejected the contention that an expansive FAA would leave them vulnerable to pressure to sign form contracts stripping them of their rights. *Id.* at 280. Instead, the Court found that the FAA provided protection against just such an abuse through its express preservation of state law. *Id.* at 281 ("In any event, § 2 gives States a method for protecting

consumers against unfair pressure to agree to a contract with an unwanted arbitration provision.").

By construing § 2's provision for revocation of an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, as a savings clause for States to apply their general contract laws, *Allied-Bruce* reaffirmed the long-recognized purpose of the Act to place arbitration clauses on equal footing with other contract provisions. 513 U.S. 281; *see also Perry*, 482 U.S. at 492 n.9 ("Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.") (emphasis in original).

The Court reaffirmed this preemption and savings balance in *Doctor's Associates*. There, the Court held that the FAA preempted a Montana statute that made arbitration clauses unenforceable unless they appeared in underlined capital letters on the first page of a contract. The Court held that, under § 2, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Under this framework, the Court again identified state laws that the FAA does not preempt,

echoing *Allied-Bruce* and *Perry* in finding that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.*; *cf. Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) ("Neither [9 U.S.C. § 3 nor § 4] purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them). Indeed § 2 explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity').").

Moreover, nothing in the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), allows Rent-A-Center to circumvent the Act's preservation of state contract law by imposing a self-enforcing arbitration clause. Indeed, it would be curious if *First Options* did this since it was decided just four months after *Allied-Bruce* recognized the need for state law to protect consumers against unfair pressure to arbitrate. Regardless, *First Options* does not authorize circumvention of state law. To the contrary, it reaffirms state law's application to arbitration clauses by holding that, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944.

The Court, of course, proceeded to recognize that parties may agree that arbitrators can decide

"arbitrability" disputes, but only if "there is 'clear and unmistakable' evidence that they did so." *Id.* (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). Even here, though, the Court was describing the ability of parties to an enforceable arbitration clause to have an arbitrator decide the scope of its application to different types of disputes, a circumstance the Court easily found not to be present where one party was "forcefully objecting to the arbitrators deciding their dispute." *Id.* at 946. What *First Options* does not say, however, is that a company can impose an arbitration clause that requires an arbitrator to decide its own validity, thereby circumventing the requirements of state contract law that the Court had recognized only four months earlier to be an essential protection for consumers against unwanted pressure to arbitrate.

Even if there were any ambiguity on this point (which there is not), the Court should reaffirm the vital role of state law in protecting individuals against unfair pressure to arbitrate by rejecting the proposal to allow self-enforcing arbitration clauses. The experience of employees, consumers, and other individuals with mandatory arbitration during the past 15 years demonstrates that judicial application of state contract law and other external substantive law has been critical for preserving these parties' ability to vindicate their legal claims in *any* forum. This is because certain companies, given what they saw as a green light to require arbitration, could not resist the temptation to stack the deck by imposing

requirements for arbitration that, if given effect, would have amounted to a get-out-of-jail-free card.

Among the prohibitive requirements for arbitration that courts have found to be unconscionable under state law or contrary to public policy are provisions requiring individual parties to pay prohibitive costs, travel to a distant out-of-state venue, or present their claims to a biased arbitral forum. *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269 (3d Cir. 2003) (invalidating provision requiring refinery workers to pay $800 to $1,000 per day arbitrator fees if they did not prevail as unconscionable under Virgin Islands contract law); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1289 (9th Cir. 2006) (*en banc*) (invalidating term requiring single franchise operator in California to arbitrate claim in parent company's home state of Massachusetts as unconscionable); *Walker v. Ryan's Family Steakhouses, Inc.*, 400 F.3d 370, 386 (6th Cir. 2005) (invalidating requirement that employee arbitrate before for-profit forum that received 42% of its gross income from the defendant). Under the approach put forth by Rent-A-Center and its *amici*, these individuals would have had to pay several thousand dollars or travel 3,000 miles or submit to a biased arbitration service their claims that these very requirements were unlawful.

Although these abuses of mandatory arbitration are not universal, they are prevalent enough that the prospect of making arbitration clauses self-enforcing would jeopardize not just the existing FAA legal

framework, but also the very notion of arbitration as a system for providing justice. As Respondent highlights in his principal brief, a State Attorney General's investigation recently brought to light evidence that the largest provider of consumer arbitration in the United States, the National Arbitration Forum ("NAF"), which handled over 200,000 consumer-debt claims in the year 2006 alone, was substantially owned by an entity that also had an ownership interest in one of the country's largest debt-collection law firms, which had a significant volume of cases before the NAF. *See* Carrick Mollenkamp, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, Wall St. J., Oct. 15, 2009, at A14. Again, under the approach proposed by Rent-A-Center and its *amici*, a lender could write its arbitration clause so that the consumer would have to go to NAF to arbitrate his or her claim that NAF's ties to the finance industry render the clause's requirement of arbitration before it unconscionable. Surely, this is not what the Court in *First Options* meant to require.

In sum, the arguments for allowing companies to impose arbitration clauses that are self-enforcing based on their own terms, without respect to applicable state law, do not comport with the letter or purposes of the FAA or with the very notion of private contractual arbitration as a system for providing justice. For each of these reasons, the decision below holding that a court must decide allegations challenging the validity of an arbitration clause before it can give the clause effect should be affirmed.

II. Lower Court Case-Law Applying the FAA Shows Greater Hostility Towards State Law Than Towards Arbitration.

Notwithstanding the foregoing, Rent-A-Center and its *amici* try to justify their proposed end-run around judicial application of state contract law on the grounds that courts cannot be trusted to perform this function because of their alleged hostility towards arbitration. In particular, the Chamber of Commerce's *amicus* brief is up-front about its use of this proposed self-enforcing arbitration clause rule to preempt much of existing judicial application of state contract law in cases where the FAA applies. *See, e.g.*, Chamber Brief at 14 ("A distorted unconscionability doctrine has become the weapon of choice for policy-based attacks on arbitration. The protean concept of unconscionability 'provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review.'") (quoting Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008)).

As discussed, the Chamber tries to support these allegations aimed at much of the judicial system by referencing studies, including its own, that purport to show disproportionate application of the state-law doctrine of unconscionability to arbitration clauses, and concluding from this that plaintiffs and federal and state courts are animated by hostility towards

arbitration. *See, e.g.,* Chamber Brief at 16-18. Respectfully, the Court should not take the Chamber's "evidence" or its conclusion at face value.

As discussed, the Chamber's evidence is problematic because its own "independent review" of the results of "federal appellate decisions," *id.* at 17, excludes the multitude of federal district court decisions that order arbitration and stay proceedings under 9 U.S.C. § 3. These cases never make it into the Chamber's study because they are not appealable under 9 U.S.C. § 16(b). Since the FAA does, however, allow direct appeals from orders *denying* arbitration, 9 U.S.C. § 16(a)(1), the Chamber's "independent" review of federal appellate case law involves a limited sample skewed towards cases with arbitration clauses whose terms previously were found to be problematic.

This flaw aside, the Court also should reject the Chamber's conclusion that cases applying state law of unconscionability demonstrate a lower-court hostility towards arbitration because this ignores what these courts are actually doing. When lower-court decisions are assessed properly, not by counting them, but by analyzing their substance, a very different picture emerges than the one painted by the Chamber. Indeed, a review of how numerous federal circuit courts have expanded the preemption holdings of *Allied-Bruce* and *Doctor's Associates* reveals a far greater hostility towards state substantive law than towards arbitration.

As discussed, both *Allied-Bruce* and *Doctor's Associates* held that the FAA preempts state laws that directly restrict arbitration clauses based on their requirement of arbitration, but does not preempt general state contract law. *Allied-Bruce*, 513 U.S. at 281; *Doctor's Assocs.*, 517 U.S. at 687. Since the Court had previously recognized that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt Info. Sciences*, 489 U.S. at 477, these decisions applied principles of implied conflict preemption in finding that the preempted laws would "place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and intent." *Allied-Bruce*, 513 U.S. at 281 (quoting *Volt Info Sciences*, 489 U.S. at 474).

But these decisions finding preemption of state anti-arbitration law and savings of generally applicable state contract law do not address a third type of state law that is more prevalent than either or both of the first two. This is state law, typically statutes, enacted to regulate a specific type of transaction, such as a consumer sale or a business franchise operation. These statutes often contain provisions regulating contract terms, such as a prohibition against contracts waiving statutory rights of consumers or against requiring a franchise operator to travel to a distant venue in the event of a legal dispute. *See* Cal. Civ. Code § 1751 (consumer anti-waiver provision); R.I. Gen. Laws § 19-28.1-14 (franchisee distant-venue prohibition). Under the Court's

implied conflict preemption analysis in *Allied-Bruce* and *Doctor's Associates*, these state laws would not be preempted if applied to arbitration clauses because they do not target the requirement of arbitration. Rather, they address the adjoining types of provisions discussed above that strip parties of statutory rights or impose distant venue requirements, *and thus could not be enforced in any other part of a franchise or consumer contract.*

Despite the absence of any conflict between this type of state law and the FAA, the lower federal courts have repeatedly held that the FAA preempts these laws. The Ninth Circuit, for example, has held that the FAA preempts both state consumer and franchisee protection statutes *wholesale* simply because these statutes do not apply to all contracts. In *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), the court addressed a carpet-cleaning franchise operator's argument that the parent company's arbitration clause violated the California Franchise Relations Act *not* by requiring arbitration, but by imposing a distant venue outside the franchisee's home state. *Id.* at 888 (addressing Cal. Bus. & Prof. Code § 20040.5). The district court applied the state statute, invalidated the distant venue requirement, and ordered arbitration to take place in California. *Id.* The Ninth Circuit reversed the district court's venue ruling on the grounds that the FAA preempts the state statutory provision. *Id.* at 890.

To reach this conclusion, the Ninth Circuit in effect held that the FAA preempts all state statutory

law that applies to some but not all contracts. The court rejected the argument that *Allied-Bruce* and *Doctor's Associates* only found preemption of state laws prohibiting or singling out arbitration clauses, ruling instead that their "reasoning is based on the principle that *only state law that addressed the enforcement of 'contracts generally' is not preempted by the FAA*," so that the Franchise Relations Act provision is preempted because it "applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id.* (emphasis added).

In so ruling, the Ninth Circuit followed the identical analyses of other circuits that previously reached the same conclusion as to the FAA's sweeping preemptive effect. *See, e.g., KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (holding that FAA preempts Rhode Island Franchise Investment Act because statute's "prohibition of non-Rhode Island venues purports to restrict the enforcement of only one sort of contract provision, forum selection clauses, in only one type of contract, franchise agreements. Under § 2 of the FAA, that is impermissible."); *Doctor's Assoc's, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (state law prohibiting franchise contracts imposing distant venue "applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent [state law] can be read to invalidate arbitral forum selection clauses in franchise agreements, it is

preempted by the FAA.") (citing *Management Recruiters Int'l v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997)).

Nor are these rulings limited to the state franchise statute provisions specifically at issue. The Ninth Circuit followed these cases and applied their analysis to hold that the FAA also preempts state consumer protection statutes for exactly the same reason. In *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), the court addressed a consumer's argument that a phone service's mandatory arbitration clause terms imposing an abridged limitations period for filing suit and prohibiting class action proceedings violated the California Consumer Legal Remedies Act's provision prohibiting "[a]ny waiver by a consumer of the provisions of this title." Cal. Civ. Code § 1751. The Ninth Circuit again held that the FAA preempts the consumer protection statute, not because it prohibits arbitration (it does not), but because it "does not apply to commercial or government contracts, or to contracts formed by nonprofit organizations and other non-commercial groups" and "also is inapplicable to rental agreements." 319 F.3d at 1148. As in the above cases, the Ninth Circuit held that, "[b]ecause the CLRA applies to such a limited set of transactions, we conclude that it is not a law of 'general applicability'" and therefore is preempted. *Id.* (citation omitted).

These circuit court decisions holding that the FAA preempts virtually all state statutory law belie the Chamber of Commerce's accusation that these very same courts somehow are animated by a hostility

towards arbitration. To the extent the Chamber is complaining that parties and courts have used the state-law doctrine of unconscionability disproportionately to challenge arbitration clauses, it has these decisions holding that the FAA preempts virtually *every other state law* to blame. Indeed, the courts issuing these broad preemption rulings appear to have recognized that the primary or sole law they were leaving in place for parties to invoke in challenging unfair pressure and overreaching arbitration clause terms was the doctrine of unconscionability. *See, e.g.*, *Bradley*, 275 F.3d at 890 n.7 ("Our holding today is not in conflict with our decision in *Ticknor* [*v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001)], where we held that the FAA did not preempt Montana law governing the unconscionability of adhesion contracts."); *Ting*, 319 F.3d at 1152 (after holding consumer protection statute preempted, applying state law of unconscionability to invalidate same challenged contract terms).

In light of the foregoing, the Court should reject Rent-A-Center's proposed rewriting of the FAA to make arbitration clauses self-enforcing and the main policy argument put forth by its *amici* in support of this new law. The accusation that the court below and other federal and state courts have been motivated by hostility towards arbitration in applying the doctrine of unconscionability is baseless, and is belied by the significant body of circuit court case-law misconstruing this Court's decisions to hold that the FAA preempts virtually all state statutory law. Since the arguments for making arbitration clauses

self-enforcing fail as a matter of law and fact, and of sound public policy, the Court should reject these arguments and affirm the decision below holding that a dispute over whether an arbitration clause is unconscionable or otherwise unenforceable is a threshold matter for a court to decide under the FAA by applying state contract law.

CONCLUSION

For the reasons set forth herein, the United States Court of Appeals for the Ninth Circuit's decision should be affirmed.

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AMICUS CURIAE BRIEF

No. 09-497

In The Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF *AMICI CURIAE*[1]

The National Consumer Law Center (NCLC) is a non-profit corporation organized in 1969 to conduct research, education and litigation to promote consumer justice. One of the NCLC's primary objectives is to provide assistance to attorneys advancing the interests of their low-income and elderly clients in the area of consumer credit and sales transactions. Accordingly, NCLC has focused considerable attention on laws to prevent abusive debt collection, including the unfair imposition of arbitration requirements on consumers and unfairness in the arbitration process itself. To that end, NCLC publishes a practice manual for attorneys entitled "Consumer Arbitration Agreements" (5th Ed. 2007 and supp.), and NCLC's Director of Litigation, Stuart T. Rossman, recently testified before the House Subcommittee on Commercial and Administrative Law on the need for legislation to protect consumers from inequitable arbitration proceedings. (September 15, 2009).

Since 1971 Consumer Action has been a pioneer in the consumer movement, working to advance consumer literacy and protect consumer rights in many areas, including credit, banking, privacy, insurance, healthcare, and utilities. With offices in San Francisco,

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Los Angeles and Washington, D.C., Consumer Action has evolved from a small basement operation to one of the most trusted national consumer organizations in the country.

As a service to consumers and community organizations in California and elsewhere, Consumer Action publishes and distributes approximately one million pieces of literature per year, free of charge, in eight different languages, on banking, credit and utility issues, including an annual survey of bank credit card interest rates and fees. In addition, the organization is a member of the Consumer Federation of America, and is actively involved in policy development, research, and legislative advocacy on credit and banking issues on behalf of consumers at both the state and national levels.

Amici have an interest in this case because arbitration agreements are implicated in many consumer disputes, and particularly in debt collection disputes. It will be increasingly difficult for consumer to have their disputes fairly heard, however, unless courts can continue to play their traditional role of ensuring that unconscionable and unfair arbitration provisions are not enforced.

SUMMARY OF ARGUMENT

The issue at stake in *Rent-A-Center, West, Inc. v. Jackson* is whether a corporation can impose a contract that strips courts of the ability to review the

fairness of an arbitration provision and instead vests all power over that question in the hands of the arbitrator himself. This Court should affirm the decision below and hold that unconscionability is a question for a court to decide because judicial review of unconscionability challenges to arbitration clauses is necessary to maintain the fairness and integrity of arbitration proceedings. While arbitration can be a fair process when conducted properly, in the absence of judicial oversight, it is all too easy for greed and self-interest to corrupt it. Courts play an indispensible role in keeping arbitration fair by striking down unconscionable arbitration provisions and thereby directing the companies that use them to make their provisions fairer.

The story of the National Arbitration Forum ("NAF"), formerly the nation's largest provider of consumer arbitrations, dramatically illustrates why judicial oversight is the only way to get bad actors to change their practices. NAF's arbitration proceedings were infected by a major conflict of interest, as NAF had the same owner as a debt collection company that brought hundreds of thousands of arbitrations before NAF. Even aside from that conflict of interest, NAF also demonstrated its pro-business bias by actively seeking out corporate clients and all but promising them that they would win their cases if they brought them before NAF. NAF made sure that pro-business arbitrators decided the overwhelming majority of cases and steered cases away from arbitrators who ruled for consumers. Although NAF is not the

arbitrator designated by the parties here, NAF's actions show how easily both arbitration provider and companies that utilize arbitration clauses in their contracts can abuse arbitration to give one side an unfair advantage.

While NAF has changed some of its rules to make them fairer, it has done so only after court decisions exposed the unfairness of those rules and struck them down as unconscionable. Even before NAF was bought by the same company that owned one of the nation's largest debt collectors, NAF's rules favored businesses over consumers in many ways. Specifically, its venue rule permitted corporations to draft arbitration clauses requiring consumers to travel across the country to arbitrate small-value claims, and its fee schedule often made arbitration prohibitively expensive for individuals of limited financial means. Only after courts declared that those rules could not be enforced – thereby threatening NAF's ability to conduct future arbitrations – did NAF reform those rules to address the courts' concerns. Absent judicial intervention, those unfair rules could still be in place today.

Allowing parties to delegate unconscionability decisions to the absolute control of an arbitrator, rather than to a court, makes it much less likely that inequitable arbitration practices will be cured. First, arbitrators, particularly NAF arbitrators, have strong disincentives to strike down arbitration provisions as unconscionable, regardless of whether those provisions are imposed by the company mandating arbitration

or by the arbitration service for which they work. If they do so, they will earn no future fees in the case before them, and they also risk not getting selected for future arbitrations. Second, arbitrator's decisions place much less pressure on companies to change their practices than court decisions because these decisions are confidential, non-binding, and often unwritten. Actors like NAF will change their practices only if they have no other choice; and they will only have no other choice if courts retain the authority to review arbitration clauses for unconscionability.

ARGUMENT

I. JUDICIAL REVIEW OF UNCONSCIONABILITY CHALLENGES TO ARBITRATION CLAUSES IS NECESSARY TO MAKE ARBITRATION AS FAIR AS POSSIBLE.

Arbitration can be a fair and efficient process for resolving disputes and lightening the burdens of the courts. At the same time, the risk that bad actors will take advantage of and undermine the fundamental goals of arbitration system for financial gain is significant. This risk is not a theoretical problem but an actual one, as evidenced by the gross misconduct of the National Arbitration Forum ("NAF"), which until several months ago was the nation's largest provider of consumer arbitrations. NAF's actions show why courts need to be able to police arbitration by reviewing arbitration provisions for unconscionability

and why such decisions should not be left solely to arbitrators.

The "neutral" forum that NAF held itself out to be was anything but impartial. First, as alleged in exhaustive detail by the Minnesota Attorney General in a recent lawsuit, NAF operated under a major conflict of interest because it shared the same parent company as one of the nation's largest debt collectors, Mann Bracken. At the same time, Mann Bracken was bringing over 125,000 arbitrations, more than half of NAF's caseload, to NAF annually. Complaint, *State of Minnesota v. National Arbitration Forum*, No. 27-CV-09-18550, ¶ 3 (Minn. Dist. Ct. July 14, 2009) [hereinafter "*Minnesota Complaint*"].[2] NAF's pro-business policies extended beyond its conflict. Even before it developed a financial connection to Mann Bracken, NAF marketed itself and its business-friendly procedures as a way to attract corporate clients, and virtually guaranteed those clients successful results in arbitration. Finally, NAF steered cases towards pro-business arbitrators and blackballed arbitrators that decided in favor of consumers. The result of these practices was that consumers virtually never prevailed in NAF arbitrations.

NAF's anti-consumer behavior was not simply the aberrational activity of a small rogue arbitration

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[2] The full text of this complaint can be found at: http://www.ag state.mn us/PDF/PressReleases/SignedFiledComplaintArbitration Company pdf.

company. Until recently, NAF was the leading forum for consumer arbitrations. Conducting over 200,000 arbitrations per year, NAF "dominated the credit card arbitration market." Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Wk., June 16, 2008. [Hereinafter "Banks v. Consumers (Guess Who Wins)"]. NAF proclaimed that it had been selected as an arbitrator in "hundreds of millions" of contracts. *Minnesota Complaint*, ¶ 18. Thus, misuse of arbitration does not affect just a few cases at the margins, but potentially hundreds of thousands of cases. As explained below, NAF's behavior demonstrates that some companies will misuse the arbitration system if given the opportunity, and shows why courts must play a role in reviewing unconscionability challenges.

A. NAF Operated Under a Major Conflict of Interest Because It Shared the Same Owner as the Debt Collection Agency that Brought the Majority Of NAF's Consumer Arbitrations.

The first, and most glaring, example of NAF's unfair practices was the fact that the company operated under a massive conflict of interest. This supposedly neutral arbitration forum was owned by the same company that also owned one of the nation's largest debt collection firms, which in turn was a party in hundreds of thousands of NAF's consumer arbitrations. This placed consumers in an unfair forum and is emblematic of an NAF structure "in

which it is exceedingly difficult for individuals to prevail." Banks v. Consumers (Guess Who Wins), *supra*.

In a methodically detailed complaint filed by the State of Minnesota against NAF, the State alleged that unbeknownst to consumers, a New York based hedge fund owned both a governing interest in NAF and the assets of the debt collection company Mann Bracken. *Minnesota Complaint*, ¶ 2. According to the lawsuit and Minnesota Attorney General Lori Swanson's testimony to Congress, Mann Bracken in turn brought hundreds of thousands of debt collection suits before NAF. *Id.*, ¶ 3; *Arbitration or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the H. Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 110th Cong., July 22, 2009, at 2-4 [hereinafter *Arbitration or 'Arbitrary'*] (testimony of the Honorable Lori Swanson, Minn. Atty. Gen.).

The lawsuit alleged that this intertwined relationship between NAF and Mann Bracken began in 2006 when Accretive, LLC formed several equity companies including Agora and Axiant. *Id.*, ¶ 32. Agora acquired a significant financial interest in NAF while Axiant acquired the assets of three large debt collectors of consumer credit card debt: Mann Bracken, Wolpoff & Abramson, and Eskanos & Adler, which all subsequently merged into the single entity called

Mann Bracken.[3] *Id.* This affiliation allowed Accretive to control both one of the largest debt collecting agencies and the arbitration forum that would decide the cases that this debt collection agency brought. *Id.* In fact, the Minnesota lawsuit states that in 2006 alone, Mann Bracken brought more than 125,000 debt-collection arbitrations, or 60% of NAF's consumer caseload, in front of NAF. *Id.*, ¶ 3.

This relationship resulted in a debt collection echo chamber that gave Mann Bracken an unfair advantage and required individual debtors to resolve disputes in a forum that was in the pocket of the opposing party. Consistent with the allegations in Minnesota's lawsuit, the C.E.O. of NAF admitted at a congressional hearing that $42 million in profits from this debt collection enterprise were distributed to NAF and its management team. *Arbitration or 'Arbitrary'*, *supra* (statement of Michael Kelly, Chief Executive Officer, National Arbitration Forum and Forthright).[4] By contrast, it would be shocking for public courts to be beholden to a private party and to have a financial incentive to rule for one party over another.[5]

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[3] A chart depicting these interweaved business interests can be at pages 11 and 20 of the Minnesota complaint.

[4] Video Webcast available at: http://oversight.house.gov/index.php?option=com_content&task=view&id=4013&Itemid=31.

[5] NAF's actions are strikingly parallel to the actions of juvenile court Judges Marc Ciavarella and Michael Conahan of Luzerne County, Pennsylvania who were disgraced for lining

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The profit stream that debt collection arbitration generated for NAF was directly tied to the success rate of debt collectors in NAF arbitrations. Even aside from revenue generated by affiliated companies, NAF received considerable fees from its creditor clients. For example, First USA Bank disclosed in court filings that it paid NAF $5 million in fees in just two years. Consumers Union, *Consumer Rights: Give Up Your Right to Sue?*, Consumer Reports, May 2000. During that period, First USA won 99.6% of its 50,000 collection cases that came before NAF. *Id.* While advocates for banks invoke the possibility that First USA could have been equally successful in court, "[m]aybe, however, the millions of dollars it paid the NAF in fees tend to produce overwhelmingly favorable results." Joseph Garrison, *Is ADR Becoming "A License to Steal"?* Conn. L. Trib., Aug. 26, 2002, at. 4.

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their own pockets by sending children to jail. The judges had a financial interest in a privately run juvenile detention facility, and over the course of four years, made millions of dollars by incarcerating without basis and for otherwise minor infractions. Dave Janoski, *Conahan, Ciavarella face new charges*, The Times-Tribune, Sept. 10, 2009. When this scandal was exposed, the Pennsylvania Supreme Court had to vacate over 5,000 cases handled by the two judges. Ryan Coyle, *Ciavarella Juvenile Cases Thrown Out*, wnep com, Jan. 25, 2010, http://www.wnep.com/news/countybycounty/wnep-luz-ciavarellas-juvenile-cases-tossed,0,3512993.story. Similarly, NAF generated millions of dollars for Axiant by deciding cases brought by Mann Bracken when Axiant had a financial interest in that company.

First USA's overwhelmingly high success rate was hardly unusual. According to data disclosed pursuant to Cal. Civ. Proc. Code § 1281.96, NAF handled 33,933 debt collection arbitrations in California from January, 2003, through March, 2007. Banks v. Consumers (Guess Who Wins), *supra*. Of the 18,075 arbitrations that were not dropped by creditors, dismissed, or settled, consumers won just 30, or 0.2%. *Id*.

Not only did NAF fail to disclose to consumers that it shared the same owner as Mann Bracken at the same time it was resolving hundreds of thousands of disputes that Mann Bracken brought, it did the opposite. NAF held itself and its services as "not affiliated or owned by any party who files a claim before the forum" and "far from being aligned with lenders or other business parties" to provide "neutral and unbiased dispute resolution." *Minnesota Complaint*, ¶ 23.

Once this conflict was exposed by the State of Minnesota, NAF quickly folded rather than vociferously disputing the complaint's allegations. Just three days following the filing of this complaint, NAF signed a consent decree with the State of Minnesota, and while not admitting liability, it made little effort to rebut the charges.[6] Consent Decree, *State of Minnesota*

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[6] Notably, NAF and Forthright C E O Michael F Kelly testified to Congress just five days after the consent decree was signed and did not explicitly deny the truth of Minnesota lawsuit's allegations. Mr. Kelly said that NAF is "no longer accepting consumer arbitrations" because it "lacks the necessary

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v. National Arbitration Forum, No. 27-CV-09-18550 (July 17, 2009).[7] NAF instead agreed to immediately cease its consumer arbitration business and to divest any interest in any business related to consumer debt disputes. *Id.* Moreover, the co-ownership of NAF and Mann Bracken was so central to Axiant's operation that both Axiant and Mann Bracken could not continue functioning following NAF's cessation of handling consumer debt disputes and had to declare bankruptcy. Nathan Koppel, *Mann Bracken, Debt Collecting Firm Extraordinaire, To Shut Down*, Wall St. Journal, Jan. 20, 2010.

NAF's structural biases demonstrate the need for judicial review of unconscionability to constrain unfair behavior. Without court involvement, other bad actors – either other arbitration providers, or companies that include arbitration clauses in their contracts – may emerge and undermine the foundations of the arbitration process. Although NAF has temporarily dropped out of the consumer arbitration business, other companies may easily fill its place, as the arbitration system remains "ripe for abuse."[8] *Staff*

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resources" to defend itself against an increasing number of legal challenges. Written Testimony of Michael F Kelly at 1, *Arbitration or 'Arbitrary'*, *supra*, at 1. Mr. Kelly never stated, however, that the complaint's allegations were false. *Id.*

[7] The full text of the Consent Decree can be found at: http://pubcit.typepad.com/files/nafconsentdecree.pdf.

[8] NAF is hardly the only company to create arbitration procedures that deny consumers the right to an impartial forum, which demonstrates the need for court involvement regardless of

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of Subcomm. on Domestic Policy of H. Comm. on Gov't Reform, Report on Arbitration Abuse, at 10 (July 21, 2009). When abuse occurs, courts must be able to step in to ensure the playing field remains level.

B. NAF Aggressively Marketed Itself To Creditors As a Forum In Which They Were Virtually Guaranteed Success.

NAF's pro-business practices were not limited to its dealings with Mann Bracken. Even before NAF became financially linked to Mann Bracken, it demonstrated that it was not a fair forum for consumers by marketing its services to creditors and all but promising them successful results. A Business Week investigation documented that while NAF publicly hailed itself as a fair and neutral forum "behind closed doors, NAF sells itself to lenders as an effective tool for collecting debts." Banks v. Consumers (Guess Who Wins), *supra*. Business Week revealed one of the most egregious examples of NAF's marketing to

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whether NAF continues to operate. *See, e.g., Walker v. Ryan's Family Steak Houses*, 400 F.3d 370, 386 (6th Cir. 2005) (finding arbitral bias where the defendant company "accounted for over 42%" of the arbitration provider's gross income); *Murray v. United Food & Commercial Workers Union*, 289 F.3d 297, 303 (4th Cir. 2002) (striking down arbitration clause for bias where the arbitration clause placed sole control over arbitrator selection in the employer's hands); *Buhrer v. BDO Seidman, L.L.P.*, 16 Mass. L. Rptr. 551 (Mass. Super Ct. 2003) ("[T]he financial interests of the arbitrators are identical to those of the defendant; this is clearly inequitable and unjust").

businesses and debt collection agencies. *Id.* It published a confidential NAF PowerPoint presentation designed to curry favor with potential corporate clients. *Id.* In the presentation, NAF promised that arbitrating with NAF would lead to a "marked increase in recovery rates over existing collection methods." *Id.*

Additionally, the Minnesota complaint quotes NAF marketing materials that emphasized to companies that consumers facing arbitration would "just hand over the money" because they would be "totally intimidated by the arbitration process." *Minnesota Complaint*, ¶ 96. According to the complaint, NAF stressed that "you [the creditor] have all the leverage and the customer has no choice but to take care of the account," and that "the customer does not know what to expect from arbitration and is more willing to pay." *Id.* In short, NAF tried to drum up businesses by telling corporations that they would be more successful in front of NAF than in any other venue.

NAF's presentation also "boasts that creditors may request arbitration maneuvers that can tilt the arbitration in their favor" by using "stays and dismissals that are free to the Claimant – to control the process and timeline." Banks v. Consumers (Guess Who Wins), *supra*. This type of marketing was done to show that filing an arbitration with NAF was a no-lose proposition for the creditor. As one NAF arbitrator told Business Week, "[i]f there is no response, you're golden. If you get a problematic [debtor], then you can request a stay or dismissal."

Id. By actively trying to persuade corporations to include provisions in their consumer agreements that require binding arbitration of disputes, in the hopes that those creditors would bring repeat business, NAF sold itself as an ally of creditors and compromised its impartiality.

C. NAF Steered Cases To Arbitrators With Track Records Of Deciding Cases For Creditors And Blackballed Arbitrators Who Awarded Money To Consumers.

Third, NAF steered cases to pro-creditor arbitrators and away from those that ruled for consumers and against creditors. Several studies of NAF arbitrations have found that NAF's case allocation practice was heavily biased toward ensuring that business-friendly panelists heard most cases. *See, e.g.*, Simone Barubeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, July 16, 2007; Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007); Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck. pdf. Data from the state of California reveals, for example, that although NAF claims to have a roster of 1,500 arbitrators, ninety percent of its debt collection cases

(17,265 cases) were decided by just 28 arbitrators.[9] *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (2007) at 15. Similarly, the Christian Science Monitor found that NAF's ten most frequently used arbitrators were assigned almost 60% of NAF's collections cases. *Consumer Advocates Slam Credit-Card Arbitration*, *supra*. Those ten arbitrators, not surprisingly, ruled for the consumer only 1.6% of the time. *Id.* By contrast, arbitrators who got three cases or fewer during that year found in favor of the consumer 38% of the time. *Id.*

This steering of cases to pro-creditor arbitrators and away from those who ruled against the creditor with even moderate frequency virtually guaranteed positive results for creditors, who were then further incentivized to given NAF additional business. One NAF arbitrator, Joseph Nardulli, once decided 68 arbitrations in a single day, giving debt holders and buyers every cent of the $1 million they demanded. *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, *supra*, at 3. Assuming Nardulli worked a 10-hour day he would have issued one decision every 8.8 minutes. *Id.* Indeed, arbitrators like Nardulli whose are paid on a per-case or hourly basis find it against their financial interest to strike down arbitration clauses and losing the associated fees. As one former NAF arbitrator noted, "I could sit on my

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[9] California and the District of Columbia are the only jurisdictions that require arbitrators such as NAF to publicly report outcome data.

back porch and do six or seven of these cases a week and make $150 a pop without raising a sweat. . . . I'd give the [credit-card companies] everything they wanted and more just to keep the business coming." Chris Serres, *Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions?* Star Trib. (Minneapolis), May 11, 2008, at 1D.

The studies also show a direct correlation between ruling for creditors and getting more business. One study revealed a linear relationship between the amount the arbitrator awarded to a creditor and the number of future cases that arbitrator was assigned, meaning that arbitrators who favored creditors were rewarded with more cases. Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration, supra*, at 9. Similarly, companies who appeared more often before NAF received a higher percentage of the amount requested in their arbitrations than did companies who appeared less often. *Id.* at 8.

NAF's other strategy was the blackballing of arbitrators who ruled in favor of consumers. Harvard Law School professor Elizabeth Bartholet testified before the Senate Judiciary Committee about how she was shut out of future cases after awarding a consumer $48,000 in damages in one case. *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, S. Comm. on Judiciary, 110th Cong. (July 23, 2008) (statement of Elizabeth Bartholet, Harvard

Law School Professor).[10] Professor Bartholet explained that when she ruled for creditors as she did in 19 of her first 20 cases (one was dismissed), she continued to get more assignments. *Id.* As soon as she awarded damages to a consumer a single time, however, NAF removed her from 11 other cases she had pending against the same credit card company. *Id.* That her single ruling in favor of a consumer prompted her removal from her remaining cases is not just speculation. Professor Bartholet testified that an NAF administrator told her that she was likely removed from her other cases because of that decision. *Id.* Professor Bartholet concluded from her experience that "the NAF process was systematically biased in favor of credit card companies" and was one that allowed credit card companies to "purchase all the justice they want." *Id.*

The NAF example reveals how easily bad actors can abuse arbitration for financial gain. If those bad actors can then require a consumer to contractually agree to take away a court's authority to address unconscionability, there will be no adequate way to rein in that abuse.

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[10] Video of this testimony is available at: http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit_id=7313.

II. Judicial Review Of Arbitration Provisions For Unconscionability Prompts Reform More Effectively Than Allowing Arbitrators To Review Such Questions.

Courts play a vital role in ensuring the arbitration system remains a fair forum for consumers. Court decisions striking down unconscionable arbitration provisions have proven effective in forcing even bad actors like NAF to reform their practices. Leaving unconscionability questions to arbitrators, however, is much less likely to spur reform because arbitrator decisions are secret, unwritten and non-binding, and because arbitrators have strong incentives to uphold arbitration clauses in order to maximize their fees and to continue receiving business. Allowing companies to strip courts of their authority by delegating decisions about the fairness of arbitration clauses to the arbitrator removes a crucial mechanism for reform and leaves consumers at the mercy of arbitration providers and corporations.

When bad actors like NAF have reformed their rules, they usually have not done so willingly. Instead, those revisions have come on the heels of judicial unconscionability decisions. Two examples illustrate this point. In cases occurring prior to when NAF and Mann Bracken became financially linked, courts found arbitration clauses utilizing NAF's venue and fee provisions unconscionable. *See Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App. 4th 1659 (Cal. Ct. App. 1993); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004). Following

those decisions, NAF changed its rules to make its venue and cost rules fairer to consumers because, if it wanted to continue profiting from arbitration, it had no other realistic choice.[11] Although these decisions did not put an end to NAF's unfair practices – as evidenced by NAF's subsequent conflict of interest – they did succeed in forcing NAF to change unfair rules that it most likely would not have changed on its own. And while this case does not involve NAF, these examples show that allowing companies that conduct arbitrations or that impose unconscionable terms in their arbitration provisions to also remove a court's ability to address unconscionability takes away an important mechanism for making arbitration fairer.

A. Court Unconscionability Decisions Spur Reform of Unfair Arbitration Provisions.

Two examples show how court decisions finding NAF's rules and procedures unconscionable have caused NAF to change some of its rules. In *Patterson v. ITT Consumer Financial Corp.*, the California

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[11] It is not just arbitration providers that respond to unconscionability decisions, but also the companies that impose arbitration on consumers and employees in their standard-form contracts. As Respondent explained, numerous courts have found unconscionable arbitration clauses that impose excessive costs, and many companies as a result now will pay all arbitration fees in consumer or employment disputes. *See* Resp. Br 37 & n.8.

Court of Appeals struck down as unconscionable a clause in the defendant's arbitration agreement that would have required a consumer in California to travel from California to Minnesota to arbitrate a $2,000 dispute. 14 Cal. App. 4th at 1665. The NAF rule at the time of *Patterson*, required the arbitration to take place at the location designated in the agreement. *Id.* at 1665. This rule provided no exception where the agreement inflicted hardship by requiring a party to travel long distances. The Court found the agreement required arbitration in Minnesota, and that the hearing would only be held upon payment of approximately $850 in fees in addition to the time and expense of traveling to Minnesota. *Id.* The court found that given the small size of the plaintiff's claim, the sheer costs of traveling all the way to Minnesota and of the arbitration itself would functionally deny the plaintiff the opportunity for a hearing. *Id.* at 1666. The court declared the arbitration provision unconscionable and unenforceable. *Id.* at 1667.

Following *Patterson*, NAF amended its venue rule to allow consumers to avoid traveling to locations that would cause significant hardship. The amended rule stated that regardless of where a contract requires arbitration to take place, "[a]n In-person Participatory Hearing shall be held, . . . for all Consumer cases, at a reasonably convenient location within the United States federal judicial district or

other national judicial district" where the consumer resides. NAF Code of Procedure, Rule 32(a) (2003).[12] The *Patterson* decision likely played a significant role in the ensuing rule change. Once a state appellate court declared that NAF's rule would not be enforced within that court's jurisdiction, NAF had little choice but to change its rule or else it would lose the ability to conduct arbitrations. Absent the *Patterson* decision, which directly implicated NAF's bottom line, there is no reason to believe that NAF would have changed its rule.

Similarly, court decisions striking down unconscionable arbitration fee provisions have led companies like NAF to amend their rules to comply with those decisions. In *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d at 1177, the Ohio Court of Appeals found that fees charged by NAF to hear a dispute were so excessive that they denied the plaintiff meaningful access to the arbitral forum and were unconscionable. Ms. Eagle sued Fred Martin Motor Company over a dysfunctional vehicle worth approximately $10,000 that she purchased from the dealership, and the dealership in turn sought to enforce the arbitration clause in the purchase agreement that required arbitration before NAF. *Id.* at 1164.

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[12] The NAF Code of Procedure can be found at. http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3.

In addressing NAF's fees, the court found that along with a basic filing fee of over $750, which far exceeded what it would have cost the plaintiff to file her case in court, NAF's rules imposed fees for virtually every type of filing, including pleadings, subpoenas, discovery orders, and continuances. *Id.* at 1173, 1176. Some fees were particularly large, including $2,500 for a document hearing, $1,500 for an initial participatory hearing, and $1,250 for written findings of fact. *Id.* The court found that based on NAF's fee schedule, Ms. Eagle would have to spend at least $4,200-$6,000, and likely more, to have her case heard. *Id.* The court found that such fees were prohibitively expensive for a person with an annual income that ranged from $14,500-$21,000 like Ms. Eagle. *Id.* at 1175.

The court also found that while NAF had procedures for providing waivers for indigent litigants, such waivers were discretionary and therefore provided insufficient protection against high costs. *Id.* at 1177. The court noted that NAF's waiver rule did not guarantee that an indigent party would receive a waiver because it stated only that NAF's director *may*, in its discretion, grant a waiver. *Id.*

Following *Eagle*, NAF revised its fee schedules in several ways to make them fairer to individuals. First, NAF changed its waiver rule to make fee waivers mandatory for eligible parties rather than discretionary. NAF Rule 45 now states that "[t]he Forum *shall* promptly issue a full or partial waiver to a Consumer Party eligible" for a waiver. NAF Code of

Procedure, Rule 45 (emphasis added). This amendment is directly responsive to the court's concerns in *Eagle*, and absent *Eagle*, it is highly unlikely that NAF would have corrected its fee waiver provision to make it fairer.

Second, NAF also enacted a new rule for requesting fee waivers in claims over $75,000, as was the claim in *Eagle*. NAF Rule 42(g), adopted after the *Eagle* decision, states that for large claim cases, a consumer "who asserts that arbitration fees prevent the Consumer Party from effectively vindicating the Consumer's case in arbitration" either can be relieved of any fee obligation or instead can "litigate the case instead of arbitrating the case." NAF Code of Procedure, Rule 42(g) (2008).

Finally, NAF also reduced some its fees for large claim hearings following *Eagle*. NAF eliminated the $2,500 hearing fee, previously the largest single cost, and now includes a hearing with its basic filing fee of $1,100. NAF Fee Schedule (2008).[13] NAF also mandates that parties split costs for written decisions where the contract requires that findings of fact be made. *Id.* As a result of these changes, if Ms. Eagle were still not eligible for a fee waiver, her case would now cost less than half of what it did when she brought it. Instead of costing $4,200-$6,000 or more to pursue her claim, *Eagle*, 809 N.E.2d at 1176, under the current fee

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[13] NAF's Fee Schedule can be found at http://www.adrforum.com/users/naf/resources/2008FeeSchedule1.doc.

schedules she would be able to file the same claim for as little as $1,100.[14]

These two examples show how court decisions declaring arbitration provisions unconscionable can induce even the worst actors to reform their practices. The notion that judicial unconscionability decisions prompts reform is not controversial, as even arbitration proponents admit that unconscionability rulings have had a positive effect. *See* Resp. Br. 41-43. Ruling in favor of Petitioner, however, will make all of these previous judicial unconscionability decisions irrelevant because judges will no longer be deciding unconscionability questions.

The value of judicial review of unconscionability challenges is significant. The fact that NAF changed its rules does not show that NAF is now a fair arbitration provider. The current allegations of NAF's conflict of interest in resolving debt collection arbitrations reveal as much. Rather, these cases show that when NAF has adjusted its rules to be a little fairer, it has done so because judicial unconscionability decisions forced its hand. Preserving the ability of neutral courts to address unconscionability in published and precedential decisions provides critical oversight of an otherwise self-regulated arbitration market.

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[14] NAF's Fee Schedule does not list a written decision fee. Even if it remained the same as in *Eagle* ($1,250), the cost of arbitration would still only come to $2,350, which is significantly less expensive than the costs Ms Eagle faced.

B. Allowing Arbitrators To Decide Unconscionability Will Not Be Effective in Making Arbitration a Fairer Process.

By contrast, allowing parties to bypass courts and vest unconscionability decisions solely with arbitrators is much less likely to lead to fairer arbitration rules and provisions. First, the structural features of arbitration create less incentive for parties to respond to an arbitration decision than to a court decision. Unlike court decisions, arbitration decisions do not need to contain reasons, or even to be written at all. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). Additionally, arbitrator decisions are typically kept confidential under arbitrator rules. *See, e.g.*, NAF Code of Procedure, Rule 4 (2008).

Consequently, even if an arbitrator were to declare a provision unconscionable, no one other than the parties involved would even know that the arbitrator did so or what the basis was for the arbitrator's decision, and the parties themselves would be prohibited from sharing the decision with others. Even if an arbitrator's decision were publicly known, unlike a precedential decision that would be binding in future cases, no future arbitrator would be required to follow that arbitrator's decision. *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998) ("Arbitrators' decisions are not intended to have precedential effect in arbitration . . . let alone in courts."). Thus, arbitrator unconscionability decisions,

unlike court decisions, do not force companies to amend their practices and provide almost no incentive for bad actors like NAF to make their arbitration procedures fairer.

Second, as the experience of NAF demonstrates, the incentive structure facing many arbitrators pushes them to uphold arbitration provisions, even unfair ones, instead of finding them unconscionable. As mentioned earlier, NAF arbitrators who ruled for creditors were steered more cases while those who ruled against companies found themselves blackballed. *See* Part I.C., *supra*. Additionally, an arbitrator who finds a clause unconscionable and unenforceable also loses the opportunity to arbitrate that case and to collect the associated fees. Thus, arbitrators have every reason to uphold arbitration clauses and little reason to find particular provisions unfair.

Although *Amicus* Pacific Legal Foundation notes that arbitrators on occasion have found arbitration provisions unconscionable, *see Amicus* Br. of Pacific Legal Foundation at 14-15, the cases it cites merely reinforce the leading role that courts play in policing unfair arbitration agreements in the consumer and employment settings. In the primary case *amicus* cites, *Labor Ready Nw., Inc. v. Crawford*, 2008 WL 1840749, at *2-4 (D. Or. Apr. 21, 2008), *amicus* correctly states that the arbitrator struck down as unconscionable an arbitration provision banning class actions, but fails to point out that the arbitrator did so *only after* the Oregon Court of Appeals had issued a decision finding a similar class action ban in an

arbitration provision unconscionable. *See id.* at *4 (citing *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 948 (Or. Ct. App. 2007)). But if the court's role in addressing unconscionability is eliminated, there will be no more precedent to guide arbitrators, and it is much less certain that future arbitrators will make unconscionability findings.

Similarly, while the court in *Smith v. Gateway, Inc.*, 2002 WL 1728615, at *3 (Tex. App. July 26, 2002), noted that an arbitrator found unconscionable an arbitration provision barring the claimant from recovering consequential, indirect or punitive damages, that decision was consistent with prevailing law – established by judicial decisions – that arbitration provisions that strip parties of available remedies are unenforceable. *See, e.g., In re Poly-Am. Ltd. P'ship*, 262 S.W.3d 337, 351-53 (Tex. 2008) (finding unconscionable an arbitration provision that prohibited punitive damages and reinstatement); *see also Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (declaring unenforceable an arbitration agreement's ban on punitive damages in a Title VII action).

The other cases *amicus* cites are inapposite because they involve business-to-business or labor arbitrations. *See* Pacific Legal Foundation Br. 14-15. In those contexts, unlike the consumer or non-union employment context, both parties are repeat players, which removes the incentive for the arbitrator to favor one side over the other. In NAF consumer arbitrations, by contrast, the creditor party was the repeat player while the consumer was not, which gave

the arbitrator a much stronger incentive to uphold the arbitration clause in order to continue getting chosen by companies for future arbitrations. Finally, even if arbitrators do on occasion find an arbitration provision unconscionable, because those decisions are private, confidential and unpublished, there is no guarantee that the decisions will prompt bad actors to change their practices. As explained above, judicial review of unconscionability challenges is much more likely to have that reforming effect.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act (FAA) is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Rent-a-Center, West, Inc.[1] PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *AT&T Mobility v. Concepcion*, Docket No. 09-893; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198; *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37 6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The purpose behind the Federal Arbitration Act (FAA) is to preserve and promote the right to contractual choice. It is not to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. In this case, the parties clearly and unmistakably agreed that an arbitrator had the "exclusive" authority to resolve all disputes arising out of their employment relationship, including such gateway issues as whether the contract itself is unconscionable. *Jackson v. Rent-a-Center West Inc.*, 581 F.3d 912 (9th Cir. 2009) ("Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator."). Under the federal substantive law of arbitration, as enunciated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), this clear and unmistakable agreement must be enforced. Because the Ninth Circuit in this case refused to do so, the decision below should be reversed.

I

A MERE ALLEGATION OF UNCONSCIONABILITY SHOULD NOT REMOVE THE ARBITRABILITY QUESTION FROM THE ARBITRATOR

As this Court has recognized, parties' freedom to contract is the foundation of arbitration agreements:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which

> transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (citation omitted). The FAA, as the statute embodying this stance, "establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Thus, in *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), the Court held that the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," because this is consistent with the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." Because arbitration is a matter of contract, the parties to a dispute "are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Id.* The FAA wisely *fosters*, but does not *dictate* agreements between private parties.

A. The FAA Creates Federal Substantive Law of Which the Rule of *First Options* Is a Part

Southland Corp. v. Keating held that the FAA is preemptive federal substantive law that applies in both state and federal courts to the exclusion of any conflicting state law. 465 U.S. 1, 10-17 (1984) (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32). The Court therefore invalidated a California statute which the California Supreme Court had interpreted as barring arbitration of franchise disputes. *Southland Corp.*, 465 U.S. at 10-17. This holding has since been reaffirmed and extended. *See, e.g., Preston v. Ferrer*, 532 U.S. at 353 n.2 (refusing invitation to overrule *Southland*); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (same).

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), this Court noted that the doctrine of separability is a rule of substantive federal law that applies in state courts as well as in federal courts. *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458-60 (2003) (Rehnquist, C.J., dissenting) (stating that the South Carolina Supreme Court's ruling allowing class arbitration was so wrong as a matter of contract interpretation that it was implicitly preempted by federal law.)[2] In *First Options*,

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[2] "[T]here is no substantive right to a class remedy; a class action is a procedural device." *Blaz v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004); *see also Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (referring to class action as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"); *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) (referring to a certified class action as merely a "procedural device aggregating multiple persons' claims" that

(continued...)

this Court developed a simple test to determine whether a court or the arbitrator should determine the arbitrability of the dispute: Does the contract send the issue to the arbitrator? 514 U.S. at 943 ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." (internal citations omitted)). If the "clear and unmistakable" language of the contract states that the arbitrator has authority to determine arbitrability, then the court's only function is to send the matter to arbitration for resolution.

B. Allowing a Mere Assertion of Unconscionability To Defeat Arbitration Undermines the Federal Policy Favoring Arbitration in All Contexts

Noting that "as a matter of federal arbitration law, a court may not compel arbitration until it is 'satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,'" *Jackson*, 581 F.3d at 916 (citation omitted), the court below held, "that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold

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[2] (...continued)
"does not entitle anyone to *be* in litigation")

question of unconscionability is for the court." *Id.* at 917. This sweeping language contradicts federal law and would apply to every type of contract, in any context. Even if this Court were inclined to base a paternalistic ruling on the presumed gap of sophistication between employers and employees (which, as argued below, is neither necessary nor warranted), the rule announced below is vastly overbroad to serve that purpose.

A rule that the mere assertion of unconscionability moves a dispute out of arbitration and into court could just as easily void arbitration contracts between two businesses, or other equally sophisticated parties, in conflict with the generally sanctioned approach. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (Upholding a private contractual agreement not to sue in any court other than the High Court of Justice in London where this choice "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (involving an international business deal between sophisticated executives and approving an agreement waiving review of an arbitrator's decision); *China Resource Prods. U.S.A., Ltd. v. Fayda Int'l, Inc.*, 747 F. Supp. 1101, 1107 (D. Del. 1990) (upholding an arbitration in China due to sophistication of parties); *Tenn. Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1326-28 (M.D. Tenn. 1990) (finding arbitration in Italy for American company not unconscionable, because the American company was a sophisticated business with international experience and could not show any unfair lack of bargaining power).

This general approach should prevail even in employment disputes, which may well involve highly sophisticated executives in conflict with their companies. "So long as something qualifies as 'arbitration' in the United States, the governing law does not meaningfully distinguish arbitrations between commercially sophisticated parties and arbitrations between parties with distinctly different bargaining positions." Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189, 1233 (2008).[3] *See also* Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol'y, 578, 587-88 (2000) ("[C]ourts that decide not to enforce arbitration agreements . . . can impose costs on the parties. Courts can't just hold something unconscionable without consequences. Given that sophisticated parties find these arbitration agreements beneficial, it seems to me that there is

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[3] Nor should courts attempt to make such a distinction. Such a regime

> would wreak havoc as courts would be forced to decide which of the two "boxes" a particular arrangement fell under. Nor could one be assured that courts could easily and fairly classify contracts as among "sophisticated" parties versus "unsophisticated" parties. An arbitration agreement between General Electric and a Hungarian start-up company may reflect a far greater relative inequality in bargaining power than, for example, a contract between a local merchant and a sophisticated investor. Thus, at best, the consumer-contract criticism would yield a world that is over-inclusive and under-inclusive. At worst, it would yield an uncertain world in which neither courts nor parties could be certain whether a particular agreement qualified for commercially sophisticated treatment.

Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151, 198 (2004).

evidence that they may be beneficial to unsophisticated parties as well.")

The decision below, which undermines the ability of parties to tailor their agreements in all contexts, may be particularly onerous to commercial enterprises and other conducting transactions in cyberspace. Private arbitration systems are favored for business over the Internet because the arbitrations tend to be less time-consuming and more responsive to the needs of the consumers themselves; the judges tend to be more expert in the relevant trade; and the parties themselves can decide upon the terms for dispute resolution. *See* Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837, 838 (2001) (discussing development of alternative forms of dispute resolution solely for cyberspace).

C. Public Policy Supports Arbitration in the Employment Context

Regardless of the relative sophistication of employers and employees, from a policy standpoint, there is nothing inherently wrong with an employer requiring arbitration of work-related disputes. The Federal Arbitration Act, which reflects congressional policy favoring arbitration, requires this outlook. *Buckeye Check Cashing*, 546 U.S. at 443.[4] People have no fundamental right to work for a specific employer. *See Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976);

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[4] As the Seventh Circuit concluded: "The cry of 'unconscionable' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

California Gillnetters Ass'n v. Department of Fish & Game, 39 Cal. App. 4th 1145, 1155 (1995) ("[T]here is no fundamental right to work for a particular employer, public or private."). Thus, in looking for a job, applicants will consider the various perceived benefits and burdens of each particular employment opportunity.

When contemplating where to work, people have to consider all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.[5] Employers may require workers to wear uniforms[6] or costumes, refrain from certain personal adornments,[7] or stick to

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[5] *See, e.g., Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1465 (9th Cir. 1996) ("[A]ll employees were required to work 'an equal number of undesirable weekend, holiday, and night shifts.' "); *N.L.R.B. v. Or. Steel Mills, Inc.*, 47 F.3d 1536, 1540 (9th Cir 1995) ("Stores clerks are required to work both nights and weekends.").

[6] *See, e.g., I.N.S. v. Fed. Labor Relations Auth.*, 855 F.2d 1454, 1464 (9th Cir. 1988) (holding that I.N.S. employees *are* required to wear uniforms and could be forbidden to wear union insignia pins (or any other adornment) on those uniforms); *Dawson v. State of Nevada*, 825 P.2d 593, 596 (Nev. 1992) (identifying crime victim because she "wore a blue Stop 'N' Go shirt as part of her work uniform").

[7] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135-36 (1st Cir 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding that it would constitute an undue hardship to require Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification, given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aimed to cultivate).

a script when speaking to customers.[8] Some employers demand a heavy travel schedule or require workers to report for duty on holidays. And of course, Nevada's casinos offer round-the-clock employment.[9] Potential workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.[10] A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not make arbitration a requirement of employment. *See Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001) (noting that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided).

Class action arbitration waivers have been adopted by some companies, but they are far from universal. A recent study bears this out. Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified

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[8] Scripted communications are standard practice in the telecommunications industry. *See* Patrick E. Michela, Comment, *"You May Have Already Won...": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. 553, 560 (1994)

[9] *See* Fredrick Preis, Jr., *et al.*, *Employment in Gaming: Recent Discrimination Issues*, 8 Gaming L. Rev. 89 (2004) ("The gaming industry provides a unique employment experience. It is an industry that never sleeps. Employees are working 24 hours a day, 365 days a year.").

[10] The State of Nevada facilitates such comparisons by providing a wealth of career opportunity information online. *See* State of Nevada Workforce Informer, *Nevada Career Information System*, *available at* http://www.nevadaworkforce.com/cgi/career/?PAGEID=3&SUBID=158 (last visited Feb 23, 2010)

"employment contracts." Theodore Eisenberg and Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Contracts of Publicly-Held Companies*, 56 DePaul L. Rev. 335, 348 (2007). Of the grand total, about 89% do *not* mandate arbitration, *id.* at 350, and about 63% of the employment contracts did *not* mandate arbitration. *Id.* Even when looking specifically at California, which the authors note has a higher rate of arbitration than New York or Delaware (the other two states most commonly identified in choice-of-law clauses), the number of contracts containing arbitration clauses still is only about 24%. *Id.* at 358. Parsing still further, the authors found that approximately 46% of employment contracts in California had arbitration clauses. *Id.* at 361. This is higher than most to be sure, but still fewer than half.[11] Thus, a potential employee who greatly values the ability to resolve disputes in court should apply to those companies who share his values on this point.

Courts must view the availability of arbitral remedies neutrally, because individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov and Beverly A. Aloisio, *Arbitration of Employment Disputes Before and After Circuit City*,

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[11] The variability of employment contracts echoes the proliferation of credit cards, many of which also require arbitration of disputes. In that context, the New York Supreme Court noted: "[I]n this day and age when credit cards are rather easily available from any of a number of issuers, the fact that the customer who elected not to accept the Arbitration Agreement would have to terminate his/her account, would not be grounds for concern." *Johnson v Chase Manhattan Bank USA, N.A.*, 2 Misc. 3d 1003(A), 784 N.Y.S.2d 921 (2004).

17 Lab. Law. 327, 343 and n.151 (2001) (noting that both employers and unions representing workers under collective bargaining agreements are repeat players in arbitration, thus equalizing concerns about bias); *see also* Thomas J. Stipanowich, *The Multi-door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (Reporting study of construction industry arbitration, that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall.") (internal citations omitted). In this way, an arbitration requirement is no different than many other job requirements that impact individual preferences, and even legally protected rights. This Court should affirm that arbitration is an accepted method of alternative dispute resolution, and it is not unconscionable for employers and workers to use it.

II

THE NINTH CIRCUIT DECISION IS BASED ON ILLEGITIMATE SUSPICION OF ARBITRATION AS A METHOD OF RESOLVING DISPUTES

The decision below treats a claim of unconscionability less as an allegation than an incantation—the mere utterance of the word and poof! the contract terms disappear. This has a wide-ranging impact, because where unconscionability challenges once appeared in fewer than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging*

and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1441 (2008). In no other context is a mere allegation, devoid of evidence, sufficient to dramatically alter the course of dispute resolution. *See, e.g.*, *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (Upholding dismissal of Jones Act claim, noting that "if a defendant files a "speaking motion" to dismiss for lack of subject matter jurisdiction, as appellees did here, the plaintiff 'cannot rest on the mere assertion that factual issues can exist.' He must come forward with evidence outside his pleadings to support his jurisdictional allegation.") (citation omitted); *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984) ("[I]n establishing in personam jurisdiction, Time Share had a burden of proof to sustain, and thus mere affidavits which parrot and do no more than restate plaintiff's allegations without identification of particular defendants and without factual content do not end the inquiry. Here, we find that Time Share's affidavit simply failed to prove any defendant's contacts with the forum state.").

The decision below nonetheless singles out arbitration contracts as particularly vulnerable to claims of unconscionability, apparently reflecting that the court simply distrusts arbitrators to decide the question, and assuming that an arbitrator would find that the parties agreed to arbitrate. Yet there is no solid basis for this assumption. Parties who have not agreed to arbitrate will not be forced to arbitrate, *First Options*, 514 U.S. at 943-44, and the plain language of the contract in this case is evidence of agreement to arbitrate. Importantly, arbitrating a challenge to the existence of an arbitration agreement does not necessarily keep the parties in arbitration, but rather

establishes the initial venue to address that challenge. *See, e.g., Metal Prods. Workers Union v. Torrington Co.*, 242 F. Supp. 813 (D. Conn. 1965), *aff'd* 358 F.2d 103 (2d Cir. 1966) (court rejected petitioner-union's request to vacate arbitrator's decision that recall of discharged employees was not arbitrable, so as to reopen a grievance involving a particular employee which it would have liked to submit to arbitration); *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 162 (6th Cir. 1996) (arbitrator initially found that the grievance was "not arbitrable" because there was no enforceable agreement, and that "neither the Company nor the Union intended to be contractually bound"); *In Re E-Systems, Inc.*, 86 Lab. Arb. 441, 446 (1986) (arbitrator held that a grievance filed on behalf of retirees protesting changes in insurance coverage was not arbitrable because retirees are not "employees").

If the arbitrator finds the contract to be unconscionable, then the dispute will not proceed in arbitration. "In all cases the disappointed claimant can go immediately to a court (under § 4 of the FAA) to seek an order compelling arbitration under the terms of what he still believes to be an enforceable arbitration agreement covering the dispute." Alan Scott Rau, "*The Arbitrability Question Itself*," 10 Am. Rev. Int'l Arb. 287, 353 (1999). And arbitrators *do*, in fact, find contracts to be unconscionable in some cases. *See, e.g., Labor Ready Nw., Inc. v. Crawford*, No. 07-1060-HA, 2008 WL 1840749, at *2 (D. Or. 2008) (arbitrator found the arbitration provision contained in an employment application was unconscionable and unenforceable); *see also Bob Schultz Motors, Inc. v.*

Kawasaki Motors Corp., U.S.A., 334 F.3d 721, 722 (8th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) (arbitrator ruled that the last sentence in the arbitration provision, which awarded costs and fees to the prevailing party, was unconscionable and unenforceable; a ruling upheld in later court proceedings); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 712 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005) (arbitrator invalidated a provision limiting damages to the amounts actually paid under the contract as unconscionable; a ruling affirmed by the Sixth Circuit Court of Appeals); *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.*, 152 Cal. App. 4th 1300, 1303 (2007) (arbitrator invalidated as unconscionable a limitation on consequential damages, a decision upheld by later review by the court); *Local 345 of Retail Store Employees Union v. Heinrich Motors, Inc.*, 63 N.Y.2d 985, 986-87 (1984) (arbitrator invalidated as unconscionable a provision in a collective bargaining agreement that prohibited retroactive awards); *Smith v. Gateway, Inc.*, No. 03-01-00589-CV, 2002 WL 1728615, at *3 (Tex. App.-Austin 2002, no pet.) (arbitrator found that the terms of the arbitration agreement that limited the remedies available to Smith were unconscionable).

Allowing an arbitrator to determine arbitrability is analogous to litigating subject-matter jurisdiction in federal court under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(1). The district courts exercise at least temporary jurisdiction over the parties, even when a defendant disputes whether the case belongs in federal court at all. *Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir. 1953) (district court has jurisdiction

to determine its own jurisdiction on ground of a federal question, and appellate court has jurisdiction to review and reverse, modify or affirm the district court's decision) (citing 28 U.S.C. § 2106). "A successful defendant will litigate the case out of court, just as a party can arbitrate the case out of arbitration." Stuart M. Widman, *What's Certain Is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, 59-JUL Disp. Resol. J. 54, 58-59 (2004).

Most importantly, courts may not harbor suspicion against an arbitral forum, just because arbitration operates under procedures that differ from court rules. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. What little empirical work has been done suggests that arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).

In fact, studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are

fairer under either system." *The New Judicial Hostility*, 2006 J. Disp. Res. 480-81 n.87 (citing David Sherwyn, *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1564 (2005)). *See also* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (discussing a survey of employment arbitrations where "[e]mployees won more often in arbitration than similar plaintiffs in court"); Michael H. LeRoy, *Getting Something for Nothing: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005) (finding that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower.) Thus, some employees may affirmatively prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system). This preference, including a preference to have arbitrability claims resolved by an arbitrator, is not unconscionable.

CONCLUSION

For the reasons set forth above, the decision below should be *reversed*.

DATED: March, 2010.

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AMICUS CURIAE BRIEF

No. 09-497

IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PROFESSIONAL ARBITRATORS AND ARBITRATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This case involves questions of substantial importance to the field of arbitration. *Amici* are professional arbitrators and arbitration scholars. They file this brief to provide the Court the benefit of their many years of practical experience and scholarly study. In our view, assigning courts the task of deciding the validity of employment and consumer arbitration agreements is most consistent with the text and underlying policies of the Federal Arbitration Act. Judicial determination of unconscionability claims in particular increases public confidence in the neutrality of arbitration and promotes consistency, predictability, and the overall fairness of the arbitration process. *Amici* include:

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have filed letters of consent with the Clerk of the Court.

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Arbitration in the Hague, President and Judge of the Asian Development Bank Administrative Tribunal, and was co-chair of the task force that developed the Due Process Protocol for the Mediation and Arbitration of Employment Disputes.

SUMMARY OF ARGUMENT

I. The Federal Arbitration Act permits a federal court to order arbitration only upon finding that the parties have entered into a written agreement to arbitrate their dispute. That agreement, in turn, must be valid under generally applicable state law principles, including the doctrine of unconscionability.

This Court has held that the question whether a party has validly agreed to arbitrate a dispute should be decided by a court in order to ensure that no one is deprived of a judicial forum unless she has truly agreed to resolve her dispute elsewhere. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). Petitioner points out, however, that the Court also has held that an arbitrator may decide whether a particular issue is within the scope of an arbitration agreement, so long as the parties have agreed to arbitrate *that* question as well. Petitioner claims the same principle applies to who should determine an agreement's validity, including whether it is unconscionable.

Even if that were right, it would not help petitioner in this case. Even if this Court were to hold, for example, that parties could agree in a second, post-dispute agreement to arbitrate the validity of the initial arbitration agreement, that second agreement would itself have to be valid and could not be enforced it if were also unconscionable.

And under this Court's clear precedents, whether the second agreement is unconscionable would be a question for the court to decide.

In this case, the agreement to arbitrate the underlying employment dispute and the agreement to arbitrate validity are part of the same arbitration agreement. Respondent's unconscionability charge goes to both parts of the agreement. Consequently, before the district court may enforce the agreement to arbitrate validity, it must necessarily resolve the unconscionability claim that applies to the agreement in its entirety.

II. That result is required by the text of the statute and this Court's precedents, but is also consistent with the purposes of the FAA and sound public policy.

The efficacy and legitimacy of arbitration depend on courts and arbitrators playing complementary roles. Courts perform a gatekeeping function by ensuring that parties are sent to arbitration, and deprived of a traditional judicial forum, only if they truly agreed to arbitrate their dispute in a valid written agreement. At the same time, by enforcing doctrines like unconscionability, courts ensure that the arbitration regime comports with traditional contract rules for bargaining fairness. The FAA itself does not significantly regulate the arbitration process, leaving that task instead to state law contract rules of general applicability. Judicial enforcement of those rules enhances public confidence in the fairness of arbitration, which could be undermined by suspicions of self-dealing if left principally to appointing agencies and to arbitrators paid to handle the cases. Having ensured the basic

fairness of the system, courts then step back and allow arbitrators to exercise their expertise in efficiently resolving particular disputes. Their decisions are then subject to reversal in only unusual circumstances, precisely because judicial involvement on the front end makes the results worthy of substantial deference.

Judicial resolution of unconscionability questions also has the advantage of allowing development of a body of law that can guide the drafting of arbitration agreements and promotes fairness, consistency, and predictability. Giving validity questions to arbitrators, on the other hand, undermines those values. Arbitration decisions typically are confidential, are rarely disseminated, and most importantly are not precedential. As a result, businesses looking for guidance on how to write a lawful arbitration agreement that they can be confident will be enforced would have nowhere to turn if judges automatically referred validity questions to arbitrators.

In fact, the past two decades of judicial decisionmaking have resulted in employment and consumer arbitration agreements that are fairer and more likely to be enforced. The development of that body of law will be impeded, if not entirely ended, if this Court were to adopt petitioner's position in this case.

ARGUMENT

I. The District Court Was Required In This Case To Decide Whether The Disputed Arbitration Agreement Was Valid And Enforceable.

The court of appeals correctly held that the district court was required to decide whether the arbitration agreement – including its obligation to arbitrate the validity of the agreement itself – was unconscionable.[2]

A. The Enforceability Of Agreements To Arbitrate The Validity Of A Consumer Or Employment Arbitration Agreement Is A Question For The Court.

A court may order parties to arbitrate under Section 4 of the FAA only upon a finding that the parties entered into a written agreement to arbitrate their dispute. *See* 9 U.S.C. § 4 (permitting court to order arbitration only if "the making of the agreement for arbitration or the failure to comply therewith is not in issue" or has been resolved in the petitioner's favor). It is this agreement that gives arbitrators the power to decide disputes and implicit in this requirement is that the written agreement be lawful and enforceable. The phrase "written agreement" thus incorporates state law principles that determine under what circumstances an alleged

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[2] This case involves solely questions regarding the unconscionability of a pre-dispute employment contract of adhesion. *Amici* take no position on the FAA's application to other kinds of contracts in other settings.

agreement shall be recognized and enforced by the courts. *Cf. First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability) courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").[3] In Section 2, Congress ratified that traditional understanding, providing that a written agreement to arbitrate is valid, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Petitioner acknowledges that ordinarily, threshold questions such as whether the parties have validly agreed to arbitrate a dispute are for the court. Petr. Br. 21-22. The reason for this rule, this Court has explained, is that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). Referring such issues to courts rather than arbitrators "avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

For the same reasons the validity of an employment or consumer arbitration agreement is a question for the court. There is no reason to assume that an employee or consumer would ordinarily agree to have an arbitrator "decide the scope of [her] own

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[3] The Court has added one caveat: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (internal punctuation in original).

powers." *First Options*, 514 U.S. at 945. To the contrary, just as parties would reasonably expect judges to determine the scope of an arbitration agreement, so too would parties expect a judge to determine the validity of a consumer or employment contract. *Id.* In this context, to hold otherwise would create an unacceptable risk of sending cases to arbitration in the absence of the valid consent that is the foundation of arbitration's legitimacy.

(A different presumption might apply in other contexts, for example business-to-business arbitration agreements where expectations may be different, and contracts of adhesion are less common. That question is not presented here and *amici* take no position on it.).

B. Even If Parties Can Agree To Arbitrate The Validity Of An Employment Or Consumer Arbitration Agreement, The Enforceability Of *That* Agreement Is For The Court To Decide.

As petitioner notes, this Court has recognized an exception to the rule that certain threshold issues are to be decided by courts rather than arbitrators. *See* Petr. Br. 22-23. But that exception ultimately is of no help to petitioner here.

In *First Options*, this Court considered whether courts or arbitrators should decide whether a particular dispute falls within the scope of an arbitration agreement. The answer to the question, the Court held, "turns upon what the parties agreed about *that* matter." 514 U.S. at 943 (emphasis in original). In particular, the Court held that the scope of arbitration is for the courts "unless there is clear and unmistakable evidence" that the parties

agreed to submit the scope question to arbitration. *Id.* at 944 (internal punctuation and citations omitted).

Petitioner argues that the same rule should apply to the question of who decides whether an arbitration agreement is valid and enforceable. Petr. Br. 22-24. So long as the employer shows by clear and unmistakable evidence that the employee agreed to submit the validity question to arbitration, petitioner argues, that agreement should be enforced like any other. *Id.*

Even if that were so, *but see* Resp. Br. 24-31, the agreement to arbitrate the validity of a consumer or employment arbitration agreement could be enforced only if two important conditions were met. First, like any agreement to arbitrate any issue, the agreement to arbitrate validity would have to satisfy the requirements of Section 2 of the FAA to be enforceable. In other words, the agreement would have to be in writing and valid under generally applicable state contract principles. *See* 9 U.S.C. § 4. Thus, for example, an agreement to arbitrate validity would not be enforceable if coerced by one side or obtained by fraud. And, as in this case, it would not be enforceable if it were unconscionable within the meaning of state law.

Second, as with any other arbitration agreement, the validity of the agreement to arbitrate validity would have to be resolved by a court. *See First Options*, 514 U.S. at 944 (establishing standard for how "*a court should decide* whether the parties have agreed to submit the arbitrability issue to arbitration") (emphasis added).

As discussed next, these two qualifications preclude sending a validity question to arbitration in the circumstances of this case.

C. In This Context, When An Agreement To Arbitrate Validity Is Part Of A General Arbitration Agreement, The Entirety Of Which Is Alleged To Be Unconscionable, A Court Must Resolve The Enforceability Of The Entire Arbitration Agreement.

Here, petitioner relies on a single arbitration clause that purports to simultaneously commit the employee to arbitrating any employment dispute as well as the validity of the arbitration agreement. The unconscionability objection respondent raises applies to the arbitration agreement as a whole. As a result, in resolving the unconscionability of the agreement to arbitrate validity – which the court is required to do under *First Options* – the court will necessarily also resolve the unconscionability of the agreement that is relied upon to compel arbitration of the underlying dispute.[4]

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[4] When a party challenges the enforceability of an entire contract, only one part of which is an arbitration clause, the validity question may be decided by the arbitrator because "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). In such cases, the law presumes that parties may validly agree to arbitrate disputes arising from their contractual relationship, even if other aspects of their agreement are not valid and enforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (permitting

Respondent can avoid this result only by assuming either that (a) the court need not decide whether the agreement to arbitrate validity is, itself, valid prior to enforcing it; or (b) the existence of a signed agreement that encompasses validity is sufficient to show a clear and unmistakable agreement to arbitrate validity. Both assumptions are mistaken.

In *First Options*, the Court made clear that even when parties are allowed to contract out of the default rule that arbitrability questions are to be decided by the court, the court retains responsibility for ensuring that the parties have, in fact, clearly and validly so agreed. In fact, the Court itself examined the evidence in *First Options* and determined that the respondents had not entered into an enforceable agreement to arbitrate the scope of the arbitration agreement. *See* 514 U.S. at 946-47. The district court in this case had the same responsibility to ensure that the alleged agreement to arbitrate validity was itself valid under state law, including under the doctrine of unconscionability.

Had the district court engaged in that analysis, it could not have found that respondent had validly consented to arbitrate validity simply because he signed the arbitration agreement. To assume the

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arbitrator to decide general validity challenge to entire contract because "no claim has been advanced by Prima Paint that F & C fraudulently induced it to enter into the agreement to arbitrate"). But when, as in this case, a party challenges the validity of an arbitration agreement or clause directly, that presumption has no place and the validity question is for the court. *See Buckeye*, 546 U.S. at 445-46.

parties agreed to arbitrate the validity of the arbitration agreement, based solely on the existence of an arbitration agreement whose validity has not yet been determined, is hopelessly circular. Respondent's signature on the document does nothing to resolve whether that agreement is to be recognized and enforced under general principles of state contract law. Surely, for example, the signature would not itself provide the "clear and unmistakable" evidence of a valid agreement to submit an arbitrability question to arbitration if respondent alleged that he signed the document at gunpoint. There is no basis for a different result where, as here, the agreement is challenged on unconscionability grounds.

II. Judicial Review Of Unconscionability Challenges Promotes The Basic Purposes Of The FAA.

Petitioner complains that, as a practical matter, respondent's position will preclude arbitrators from resolving validity claims in a great majority of cases. That may be so. But as shown above, that result is entirely consistent with the language of the statute and the decisions of this Court. Moreover, as discussed next, it also furthers the basic purposes of the statute.

A. Congress Intended Cooperative And Complementary Roles For Courts And Arbitrators Under The FAA.

While Congress surely intended the FAA to "overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), it just as plainly gave courts

important responsibilities in safeguarding the fairness and legitimacy of arbitration. Indeed, courts and arbitrators play cooperative and complementary roles under the statute.

Arbitration often provides an effective – and sometimes superior – method for resolving legal conflicts. At the same time, the norm in our legal system is open access to a judicial forum to resolve legal disputes, particularly disputes involving statutory rights. *See, e.g.*, Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 SPG LAW & CONTEMP. PROBS. 279, 309-18 (2004). Congress struck a balance under the FAA, encouraging the use of arbitration by removing prior judicial impediments to the enforcement of arbitration agreements, while at the same time precluding courts from forcing parties to arbitration in the absence of the parties' freely given consent or when the contract to arbitrate fails the basic requirements of fairness required under general state law contract principles. *See* 9 U.S.C. §§ 2, 4.

Judicial determination of threshold issues – including the conscionability of an arbitration agreement – ensures that arbitration is consensual, and that its rules are fundamentally fair. *See, e.g.*, *Hume v. United States*, 132 U.S. 406, 406 (1889) (explaining that an unconscionable contract is one that "no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other"). Such review is critical because the FAA itself provides few requirements for, or limitations on, the arbitration process itself. Congress instead left the policing of the fairness of arbitration to state law contract

principles of general applicability including the doctrine of unconscionability. 9 U.S.C. § 2.

Excluding judicial consideration of such questions in the course of a Section 3 or 4 proceeding would effectively eliminate judicial review of these critical prerequisites to a fair and legitimate arbitration proceeding. The availability of judicial review *after* the arbitration has been completed is no substitute. The Act allows courts to vacate or modify arbitration awards only "in very unusual circumstances." *First Options*, 514 U.S. at 942. And those grounds, set out in Sections 10 and 11 of the Act, focus on the case-specific misconduct or mistakes of particular arbitrators, not on the fairness of the rules or the forum of arbitration.[5] That extreme deference at the end of the arbitration process is justifiable because courts have the authority at the outset to ensure that the parties validly agreed to the arbitral process and that the process is worthy of the

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[5] *See* 9 U.S.C. § 10(a)(1) ("the award was procured by corruption, fraud, or undue means"); *id.* § 10(a)(2) ("partiality or corruption" of arbitrators); *id.* § 10(a)(3) (arbitrator "misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence . . . or of any other misbehavior"); *id.* § 10(a)(4) (abritrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"); *id.* § 11(a) ("an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"); *id.* § 11(b) "[w]here the arbitrators have awarded upon a matter not submitted to them"); *id.* § 11(c) ("[w]here the award is imperfect in matter of form").

confidence the law places upon it to produce fair results in particular cases.[6]

The FAA thus effects a sensible distribution of authority and responsibility between courts and arbitrators. Courts monitor the gate, controlling who is required to forgo litigation in favor of arbitration, and policing the rules of the game in accordance with established, generally applicable contract law principles. They then step back and allow arbitrators to make their case-specific findings, subject to reversal by the courts only in extreme cases of unexpected failures in an otherwise trustworthy system.

B. Judicial Determination Of Unconscionability Claims Enhances Public Confidence In The Fairness And Legitimacy Of Arbitration.

The FAA's division of authority between courts and arbitrators makes great sense. It protects arbitrators and appointing agencies from allegations that their threshold determinations are tainted by self-interest, thereby enhancing public confidence in our arbitration system, and ultimately encouraging its use.

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[6] In part because of these highly deferential standards, but also for other reasons, many employees with meritorious unconscionability claims may never bring them before a court if forced to first arbitrate the claim. *See* Resp. Br. 45-47. This is particularly likely when the unconscionability of the agreement arises from the fact that the agreement makes arbitration so burdensome or expensive that employees will be deterred from prosecuting their claims in the arbitral forum. *See infra* 26-27.

Whether fairly or not, some members of the public may doubt the ability of arbitrators to neutrally adjudicate threshold issues that will determine whether the arbitrator's services will be required to resolve the dispute. Indeed, while the vast majority of arbitrators would apply unconscionability doctrine in good faith if called to do so, the task can put arbitrators in an awkward position, particularly when a party's claim is founded upon the alleged unfairness of rules adopted by the person or organization that selected the arbitrator. Some arbitrators may fear that declaring the selecting party's arbitration agreement or rules unconscionable would diminish the likelihood that the arbitrator would be selected again in future cases, much to the arbitrator's long-term financial detriment.

In the end, even the appearance of possible bias or self-interest by arbitrators could undermine the public's willingness to take advantage of arbitration. *Cf. Commonwealth Coatings Corp. v. Cont. Cas. Co.*, 393 U.S. 145, 150 (1967) (noting general presumption that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). At the same time, complaints about the neutrality of arbitration have led to calls to limit the FAA, as applied in a number of contexts, including employment contracts. *See, e.g.*, Arbitration Fairness Act of 2009, H.R. 1020 (111th Cong., 1st Sess.).

In fact, the arbitration community has no interest in presiding over disputes in which arbitration was not freely and validly agreed to by

both parties. And, as discussed next, in our view judicial unconscionability review has contributed to improvements in the fairness and efficacy of arbitration.

C. Judicial Determination Of Unconscionability Claims Promotes Uniformity, Predictability, And The Fairness Of Arbitration.

In addition to its neutrality, judicial resolution of unconscionability claims allows for the development of a body of law that promotes consistency, predictability, and ultimately the fairness of arbitration, in a way that arbitral decisionmaking simply cannot.

1. Judicial Resolution Of Unconscionability Claims Creates A Body Of Precedent That Promotes Equal Treatment And Consistent Enforcement Of Arbitration Agreements.

Judicial decisions on threshold arbitration issues are public, widely disseminated, and precedential. As a result, over the past two decades, resolution of unconscionability claims by the courts has led to the development of an extensive body of law defining the requirements for valid arbitration agreements. That body of law, in turn, promotes equal treatment of similar arbitration agreements in similar settings. At the same time, the developing body of precedent affords businesses and employers guidance on how to write arbitration agreements that they can have confidence will actually be enforced when challenged. The importance of that predictability should not be underestimated. The value of ensuring an arbitral

forum – and avoiding the expense, distraction, and delay of traditional litigation – is often overwhelmingly more important to an employer or business than is maintaining any particular feature of an arbitration scheme. In the absence of any statutory guidance on the question, judicial decisions provide critical direction to those drafting arbitration agreements and to agencies establishing arbitration rules.

Arbitral unconscionability decisions cannot perform this valuable function. Arbitration decisions, particularly in the consumer and employment context, often contain no written analysis and usually are confidential. *See, e.g.*, American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, Rule 23 ("The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary."), *available at* http://www.adr.org/sp.asp?id=32904.

Even when not secret, arbitration decisions are not systematically published or otherwise widely disseminated. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1284-86 (2009). And even if they were, the decisions lack any binding precedential authority. In fact, neither courts nor arbitrators treat arbitration decisions as precedential. *See, e.g.*, William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 248 (1979). To the contrary, when called upon to decide unconscionability claims, arbitrators themselves rely on judicial precedent, a body of law that can develop

only if judges, rather than arbitrators, decide most unconscionability questions in the first instance.[7]

2. *Judicial Resolution Of Unconscionability Claims Has Led To An Evolutionary Improvement In Arbitration Agreements.*

The Court need not speculate about the benefits of judicial resolution of claims that arbitration agreements are unconscionable; over the past twenty years, judicial decisionmaking has in fact improved the substance of arbitration clauses as drafters have responded to the case law with new generations of fairer arbitration agreements that are now more likely to be enforced.

While there continue to be disputes among parties as well as courts over some aspects of arbitration agreements, years of judicial decisions have led to a basic consensus on some important questions and have ended a number of egregious practices adopted by early arbitration agreements.

For example, courts have found unconscionable agreements that required arbitration of consumer or employee claims while preserving the drafter's right to sue the consumer or employee in court. *See, e.g.*, *Cordova v. World Finance Corp. of N.M.*, 208 P.3d 901, 908-09 (N.M. 2009) (lender agreement required borrower to arbitrate claims, while preserving loan

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[7] Even if arbitral unconscionability decisions are challenged in court, those judicial decisions may not result in useful precedent defining the contours of unconscionability because the standard of review permits courts to overturn incorrect legal determinations only in "very unusual circumstances." *First Options*, 514 U.S. at 942.

company's right to pursue claims in court); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 n.12 (W. Va. 2002) (same for jewelry company); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172-73 (N.D. Cal. 2002) (same for mortgage lender); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 367 (Ark. 2000) (same for payday lender); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (same for employment agreement).

In other cases, the courts have refused to enforce agreements that permitted the drafter of the agreement to choose the arbitrator. *See, e.g., State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mont. 2006) (president of company that drafted agreement permitted to choose the arbitrator); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Ok. Ct. App. 1993) (employer has sole authority to appoint arbitration panel). Relatedly, courts have declined to enforce agreements under which the drafter (or a closely related entity) had sole authority to select the pool of eligible arbitrators, sometimes resulting in a financial dependency between individual arbitrators and a party. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004) (employer chooses panel of eligible arbitrators); *Murray v. United Commercial Food Workers Intern'l Union*, 289 F.3d 297, 303 (4th Cir. 2002) (same); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (same); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 947-48 (N.D. Ind. 2000) (same); *see also Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173-74 (Cal. 1981) (agreement called for dispute between union and non-union member to be arbitrated by a member of the union).

Other agreements permitted the drafter unfettered discretion to establish the rules of arbitration and to unilaterally change them at any time. *See, e.g., Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008); *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259-60 (9th Cir. 2005); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002); *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000); *Hooters*, 173 F.3d at 939. And in some cases, arbitration agreements have been held unenforceable because the rules of arbitration were egregiously one-sided. *See, e.g., Hooters*, 173 F.3d at 938-39 (employee, but not employer, was required to give pre-hearing notice of arguments and witnesses, precluded from moving for summary judgment, and prevented from seeking vacatur of arbitral decision on ground that that the arbitrators exceeded their authority).

Courts likewise have refused to enforce provisions in some agreements that established arbitration venues great distances from consumers or employees, effectively preventing both litigation and arbitration of covered disputes. *See, e.g., Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (car purchase agreement required purchaser in Arkansas to arbitrate in Missouri); *Hagedorn v. Veritas Software Corp.*, 250 F. Supp. 2d 857, 862 (S.D. Ohio 2002) (employment agreement required lifelong Ohio resident to arbitrate in San Francisco); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (small consumer claims from across the nation required to be arbitrated in person in California); *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *32–*36 (N.D. Ill. Aug.

20, 2002) (credit repair service's agreement required consumer to travel from Illinois to Florida).

Courts have also found unconscionable provisions that required employees or consumers to pay arbitration fees and costs so high as to effectively prevent arbitration of the claims. *See, e.g., McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004) (finding unconscionable provision imposing arbitration fees higher than damages sought); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (striking agreement that would have required terminated janitorial employee to pay up to $5,000 to arbitrate age discrimination claim); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (finding unconscionable provision requiring terminated sales representative to pay $2,000 filing fee); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (refusing to construe arbitration agreement to permit imposing costs of up to $1,000 per day upon terminated security guard); *Comb*, 218 F. Supp. 2d at 1176 (finding unconscionable provision requiring consumer to pay up to $5,000 in costs to arbitrate claims of less than $310).

Even when not precluding vindication of important rights entirely, some arbitration agreements drastically limited the scope of the relief available, effectively constituting a waiver of important legal rights rather than simply providing an alternative forum for the resolution of statutory claims. *See, e.g., Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 304 n.3 (Mo. Ct. App. 2005) (agreement precluding consequential damages);

Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 279 (3d Cir. 2004) (agreement precluding award of statutorily authorized attorney's fees); *Carll v. Terminix Int'l Co.*, 793 A.2d 921, 923 (Pa. Super. 2002) (agreement precluding most monetary damages awards); *Paladino*, 134 F.3d at 1061-62 (agreement precluding non-contractual damages for Title VII claims); *see also Graham Oil Co. v. ARCO Prods. Co., a Div. of Atl. Richfield Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (agreement replaced statutory one year limitations period with a ninety-day statute of limitations).

2. Because they were public and precedential, these decisions prompted companies and arbitration organizations to reconsider their practices, leading to revisions that made arbitration agreements fairer and enforcement of arbitration clauses more predictable. *See generally*, Brief of AT&T Mobility LLC as *Amicus Curiae* In Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, No. 07-976, at 11 (2008) (explaining that AT&T Mobility "and other companies responded to the decisions invalidating first-generation arbitration provisions by revising their arbitration agreements to address the concerns expressed in those decisions") (collecting sources); Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1414 PLI/Corp 305, 315 (2004).

At the same time, there has been a productive dialog between the courts and arbitration organizations and practitioners, leading to changes in the rules applied in many arbitration settings. *See, e.g.*, Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes

Advisory Committee, *available at* http://www.adr.org/sp.asp?id=22019.

More remains to be done. Some unfair agreements continue to be written and consensus on some questions has yet to be achieved. But accepting petitioner's position in this case would prevent further progress and risk a return to the uncertainty and unfairness that often prevailed before courts began to develop a body of public precedent to protect the integrity of the arbitration process and provide needed guidance to the arbitration community.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF AMICUS CURIAE OF SERVICE EMPLOYEES INTERNATIONAL UNION, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, WOMEN'S EMPLOYMENT RIGHTS CLINIC, AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI

Service Employees International Union ("SEIU"), Legal Aid Society – Employment Law Center ("LAS-ELC"), National Employment Lawyers Association ("NELA"), National Employment Law Project ("NELP"), Women's Employment Rights Clinic ("WERC"), and The Employee Rights Advocacy Institute For Law & Policy submit this amicus brief in support of respondent Antonio Jackson.[1]

SEIU is one of the largest labor organizations in the world, representing 2.2 million working men and women. SEIU has long worked to protect the rights of all low-wage employees, union and non-union alike. The workers represented by SEIU and its local affiliates are heavily concentrated in low-wage industries (including the janitorial, health services, long-term care, and security industries), where workers frequently have limited literacy skills, do not speak English, and, when unorganized, are often compelled by financial circumstances to accept whatever terms and conditions of employment are dictated by their employers.

NELP is a non-profit legal organization with over 30 years' experience advocating for the rights of low-wage and unemployed workers. NELP has litigated and participated in many cases addressing workplace rights under state and federal labor and employment laws. NELP also provides legal assistance to labor unions and worker organizations regarding the workplace rights of immigrant and low-wage workers.

LAS-ELC is a non-profit public interest law firm whose

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel, party, or person other than amici, their members, or their counsel made a monetary contribution to fund its preparation and submission. The parties consent to the filing of this brief

mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, LAS-ELC has represented plaintiffs in employment cases, particularly in cases of special importance to communities of color, women, recent immigrants, individuals with disabilities, LGBT individuals, and the working poor.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA is the country's largest professional organization comprised exclusively of lawyers representing individual workers in cases involving labor, employment, and civil rights disputes.

WERC is a clinical program of the Golden Gate University School of Law that provides comprehensive services for workplace problems. WERC advises and represents low-income and immigrant clients on a variety of employment-related matters.

The Employee Rights Advocacy Institute For Law & Policy is a non-profit public interest organization that advocates for employee rights, equality, and justice through a multi-disciplinary approach combining legal strategies, policy development, grassroots advocacy, and public education.

Amici are each acutely aware, based on their extensive experience working with and representing low-wage workers, that in the two decades since *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), employers have increasingly been imposing mandatory pre-dispute arbitration agreements on workers as a condition of employment, just as petitioner Rent-A-Center did here. Particularly in the current distressed economic climate, low-wage and other vulnerable American workers have no choice about whether to reject or to negotiate over the terms imposed by

such agreements, and often do not understand the consequences of what they have agreed to or what rights they may thereby have waived. In amici's experience, it is all too common for non-unionized employers to take advantage of their grossly superior bargaining power by including one-sided terms in arbitration agreements that impose daunting and sometimes insurmountable barriers to the effective enforcement of the anti-discrimination, minimum wage, and workplace safety protections guaranteed by federal and state law.

Historically, amici and the workers we represent have relied on the state and federal courts as a crucial bulwark against the most egregious overreaching by employers seeking to implement one-sided employment arbitration agreements. While amici have found that the rules and procedures of mandatory employment arbitration are often slanted in favor of the employers who drafted and imposed them, state and federal judges have on innumerable occasions protected workers from the most extreme examples of employer overreaching; and employer awareness of the courts' traditional oversight role in adjudicating gateway issues of contract enforceability has served as a meaningful deterrent to those who might otherwise exploit their economic power for improper exculpatory purposes.

Amici believe that to allow employers to eliminate the courts' vital oversight role by imposing non-negotiable contract terms that vest all decisions concerning contract formation, validity, and enforceability in the employers' chosen arbitrator would make a mockery of the concept of arbitration as "just another forum." Not only would such a result have the practical effect of undermining the ability of low-wage and other workers to vindicate their fundamental, non-waivable workplace rights and the public interests they embody, but for the reasons set forth below, such a ruling would be contrary to the Federal

Arbitration Act and to the basic contract principles under which arbitration operates, including the well-established Nevada contract law principles that govern this case under Section 2 of the FAA, 9 U.S.C. §2.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici entirely agree with respondent that Congress, in Sections 2 and 4 of the FAA, required courts, not arbitrators, to resolve all threshold unconscionability challenges to the enforceability of an arbitration agreement. That conclusion flows both from the statutory text and from the contractual nature of the duty to arbitrate; a court cannot compel arbitration without first determining that a valid and enforceable contact to arbitrate exists. Amici write separately to explain that, even if the right to have a court decide threshold challenges to enforceability can be waived through "clear and unmistakable" agreement, a court must still determine as a threshold matter whether a valid and enforceable *delegation agreement* has been made. That preliminary judicial determination requires application of state law contract principles under FAA §2, including the same rules of interpretation and defenses to enforceability that apply to all other contracts under applicable state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

Under Nevada contract law, which follows black letter contract law, whether there has been a clear and unmistakable agreement to a contract provision depends not only on the language of the provision itself, but also upon the language and structure of the contract as a whole, the circumstances of its adoption, and any negotiating history. *See, e.g., Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42 (1993). For that reason, even if this Court holds, as a threshold matter, that

the FAA does *not* vest all questions of enforceability in the courts without permitting waiver, the Ninth Circuit's remand order should still be affirmed – to enable the district court to determine, under Nevada law, whether Jackson did in fact clearly and unmistakably enter into an enforceable agreement to delegate to the arbitrator the sole and exclusive power to decide unconscionability. Because Rent-A-Center's delegation clause was incorporated into a non-negotiable, mandatory employment arbitration agreement, the district court on remand is likely to find that respondent Jackson did not "clearly and unmistakably" agree to waive his right to pre-arbitration judicial review of threshold enforceability issues; and even if he did, that the delegation clause is legally unenforceable under applicable Nevada law because: 1) the clause is itself unconscionable, *see infra* Part II.B; and 2) the clause is subject to rescission because it rests on the parties' mutual mistake concerning the availability of de novo judicial review, *see infra* Part II.C.

ARGUMENT

I. A Court Cannot Compel Arbitration Without First Determining that a Valid and Enforceable Contractual Agreement To Arbitrate Exists

At the outset, amici note their agreement with Jackson that the FAA precludes arbitration of unconscionability challenges to an arbitration agreement, and that the "clear and unmistakable" evidence exception announced in *First Options*, 514 U.S. 938, and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), applies only to disputes concerning scope and coverage. Resp. Br. 23-31. That conclusion is mandated not only by the text of the FAA, as Jackson emphasizes, but also by basic principles of contract law.

"The duty to arbitrate [is] of contractual origin." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547

(1964). Thus, while the FAA "place[s] [arbitration] agreements upon the same footing as other contracts," *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (citation omitted), the FAA does itself not create any duty to arbitrate. *See Volt*, 489 U.S. at 474-75. The duty to arbitrate, and the power of the parties' chosen arbitrator to decide the disputes presented, exist only to the extent the parties have entered into a valid contract under "general contract law principles." Consequently, that contractual duty may be enforced only to the extent state contract law permits, and may be invalidated "'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. §2) (emphasis in original). "[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Rent-A-Center's arbitration agreement, which Jackson was required to sign as a non-negotiable condition of his employment, Jt. App. 41, purports to vest in the parties' designated arbitrator the power to decide two categories of threshold disputes concerning the arbitrator's power – disputes that this Court has held are presumptively vested in the courts. The first category encompasses "the validity of the arbitration clause," i.e., issues of enforceability. The second category encompasses disputes over the arbitration contract's "applicability to the underlying dispute between the parties," i.e., issues of scope and coverage. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (describing two kinds of gateway issues). The FAA assigns both categories of "gateway" arbitrability questions to the courts for resolution, as this Court has repeatedly held. *See, e.g., AT&T*, 475 U.S. at 648-49; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

While this Court has explained that some gateway disputes may be decided by the parties' designated arbitrator upon a showing of "clear and unmistakable" evidence that the parties agreed to delegate those questions to the arbitrator, *see First Options*, 514 U.S. at 944; *AT&T*, 475 U.S. at 649, this Court has never held, and cannot hold consistently with the FAA and the purely contractual nature of the right to arbitrate, that an arbitrator may determine the very validity of the arbitration contract that supposedly creates his arbitral authority.

Because a contracting party's duty to arbitrate depends upon the existence of a valid and enforceable contractual agreement to arbitrate, "a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *John Wiley & Sons*, 376 U.S. at 547. This is true no matter how "clear and unmistakable" the parties' agreement appears to be. Quite simply, an arbitrator cannot make threshold determinations of contract enforceability because, in the absence of a valid and enforceable contractual agreement to arbitrate, the arbitrator has no authority to resolve that or any other dispute between the parties.

A state law unconscionability challenge to the enforceability of an arbitration agreement is a dispute that only the courts can resolve, regardless of what authority the contract – whose validity is disputed – purports to confer on the arbitrator. Like other common threshold challenges to the enforceability of an arbitration agreement (for example, that it was procured through fraud or duress, or never executed, or that one party lacked capacity or did not receive legally valid consideration), unconscionability challenges go to the validity and enforceability of the agreement itself and call into question the existence of *any* contractual duty to arbitrate. *See, e.g.*, *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 551, 558 (2004)

(finding arbitration clause with unreasonable liquidated damages and costs provisions "void as unconscionable"). Just as in cases involving fraud or duress, unconscionable agreements are invalidated in order to prevent one party from taking undue advantage of another party's weakness. *See Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89 (1995) (unconscionability doctrine permits courts to strike "contract terms so one-sided as to oppress or unfairly surprise an innocent party") (citation omitted).

This Court has recognized that unconscionability, like fraud or duress, constitutes grounds for invalidating an arbitration agreement – as did Congress when it incorporated state contract law principles into FAA §2. *See Doctor's Associates*, 517 U.S. at 687 ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2."). Because there can be no judicial order compelling arbitration under FAA §4 without a predicate finding of a valid duty to arbitrate, any challenge to the validity and enforceability of the arbitration agreement – whether based on fraud, unconscionability, duress, or statutory preclusion – must be resolved prior to the issuance of such an order.

Notably, neither FAA §3 nor §4 provides a substantive standard for determining whether a contract was "made" or whether a dispute "is referable to arbitration." Instead, Congress intended the governing standard to be provided by §2, which requires that contracts not be subject to any "ground[] as exist[s] at law or in equity for the revocation of any contract." 9 U.S.C. §2. Were it otherwise, arbitration agreements would be *more* enforceable than other contracts in federal court, contrary to this Court's recognition that the FAA simply places arbitration agreements on the "same footing" as other contracts. *Volt*, 489 U.S. at 474.

Challenges to the scope or coverage of an arbitration agreement do not implicate the validity of the arbitration agreement itself. Those disputes involve the *meaning* of a concededly valid and enforceable arbitration agreement and therefore *may* be submitted to the arbitrator in the first instance (since the parties agree that they must arbitrate, but disagree as a matter of contract interpretation about whether their admittedly valid agreement encompasses the particular dispute at issue).

Neither of the cases in which the Court announced the "clear and unmistakable" evidence standard involved a challenge to the enforceability of the arbitration agreement itself. In *AT&T*, the parties disputed whether a union grievance regarding layoffs was arbitrable under the language of their collective bargaining agreement. 475 U.S. at 645-46. The appropriateness of allowing parties – particularly parties with equal bargaining power, as in the labor-management context – to assign such questions of contract construction and application to the parties' chosen arbitrator (often selected based on extensive prior experience resolving disputes over the "law of the shop," *see, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960)) is well-established; and in many instances such arbitrators are actually "in a better position than courts to interpret the terms of [an agreement]," *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 (1998). That is why, particularly in the collective bargaining context, it is fairly common for parties "clearly and unmistakably" to agree that issues of scope and coverage should be decided by their designated arbitrator, and not by the courts.[2]

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[2] This Court has long recognized that, even if the parties have comparable bargaining power, permitting arbitrators to police their own authority by resolving questions of arbitrability creates serious risks that are acceptable only where the parties' agreement contains "a clear demonstration of that purpose." *Warrior & Gulf Nav. Co.*, 363

First Options is even less relevant to the question presented here. The issue in *First Options* was whether the Kaplans had by their conduct entered into a *post-dispute* agreement to arbitrate questions concerning the reach of a prior arbitration agreement between their wholly-owned investment company and First Options. 514 U.S. at 946-47. This Court concluded that the Kaplans had never agreed to arbitrate in their personal capacities, and ordered vacatur of the arbitrator's contrary ruling. *Id.* at 946. *First Options* thus simply reaffirms that courts, not arbitrators, should decide as a threshold matter whether the parties have agreed to arbitrate their disputes, and that a party cannot be bound by an arbitrator's ruling unless the courts independently find a binding agreement to arbitrate.

The dispute in this case centers on the fundamental validity of the arbitration agreement between Jackson and Rent-A-Center, rather than on the meaning of the agreement's provisions or the intended scope of its application. Because an order to compel arbitration under FAA §4 requires the existence of a contract to arbitrate that is valid and enforceable under applicable state law (including the state law of unconscionability), amici agree with Jackson and the Ninth Circuit that this case must be remanded for further consideration of Jackson's contention that the arbitration agreement is unconscionable and therefore unenforceable.

U.S at 583 n.7 (citing Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1508-09 (1959)). Nonetheless, the arbitrator's special knowledge of industry practices, the law of the shop, the parties' bargaining history, and the needs of the workplace, *id.* at 581-82; the arbitrator's special role in establishing a "system of self government" for the parties, *id.* at 581 (citation omitted); and the desire to avoid any industrial strife associated with disputes over arbitrability, *id.* at 578, frequently lead the parties to submit questions of scope and coverage to arbitration.

II. Under Nevada Law, There Was No Valid Agreement To Permit the Arbitrator To Resolve Jackson's Threshold Unconscionability Challenge

Even if the Court concludes that parties to an arbitration agreement *may* vest the arbitrator with authority to decide whether the arbitration contract is enforceable, still it is for the courts under FAA §§2-4 to determine, as a threshold matter, whether the parties *have* entered into such a clear and unmistakable agreement. In making that threshold determination, courts must apply the same rules of contract interpretation and defenses to contract enforceability that apply under state law to other agreements, except that the parties' intent to arbitrate such issues must be "clear and unmistakable." *First Options*, 514 U.S. at 944-45. Given the serious risks presented by vesting such authority in the arbitrator, *see, e.g.*, *infra* Part II.B (describing unconscionability challenges that cannot be adequately resolved through arbitration), it is important that courts carefully evaluate the existence and validity of the agreement before compelling arbitration.[3]

In this case, there are at least two reasons why, under Nevada law as incorporated under FAA §2, the district

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[3] The Chamber of Commerce argues that the Ninth Circuit's decision vesting threshold enforceability issues in courts will result in unnecessary "mini-trials" and leave companies "unable to avoid civil litigation." Chamber Br. 11. However, even if the Court ultimately rules that threshold issues of unconscionability can be contractually assigned to the arbitrator for decision, civil litigation over the precursor issue concerning whether there was a valid delegation agreement will still be required, because even Rent-A-Center acknowledges that a court must resolve *that* issue before compelling arbitration. Pet. Br. 24. As explained *infra* Part II.A, the court must determine both whether the delegation agreement is "clear and unmistakable" under state law and whether the agreement is legally valid and enforceable under state law.

court on remand could properly conclude that Jackson did not clearly and unmistakably enter a legally binding agreement to have an arbitrator decide unconscionability challenges to Rent-A-Center's mandatory pre-dispute arbitration agree-ment. First, the delegation clause itself may be unconscionable and unenforceable under Nevada law, separate and apart from whether the arbitration contract as a whole is unconscionable. Second, the contract language as a whole demonstrates that the critical "delegation" clause may have been premised on a mutual mistake, which requires its rescission under Nevada law. Because, at a minimum, serious questions exist about the enforceability of Jackson's purported agreement to delegate all threshold issues to the arbitrator, this Court should affirm the Ninth Circuit's decision remanding this case for further proceedings, even if it concludes that an adhesive arbitration agreement can waive the parties' right to have threshold enforceability challenges to that agreement judicially determined.

A. A District Court May Not Compel Arbitration of Threshold Enforceability Challenges Without First Concluding that the Parties Entered into an Enforceable Agreement To Do So

Rent-A-Center acknowledges that, even under its construction of the FAA, the parties' purported agreement to assign enforceability issues to the arbitrator does not entirely usurp the courts' gatekeeping role; a court must still determine whether the parties actually entered into a contract providing for arbitration of those issues. *See* Pet. Br. 24. In other words, whatever else may be disputed in this case, all parties and their amici agree, at a minimum, that a court must at least adjudicate any preliminary disputes about whether the contracting parties entered into a valid contractual agreement to arbitrate threshold enforceability issues. *First Options*, 514 U.S. at 943.

As this Court explained in *First Options*, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." 514 U.S. at 944. That rule, however, is subject to "an important qualification": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear[] and unmistakabl[e]' evidence that they did so." *Id.* (citing *AT&T*, 475 U.S. at 649) (alterations in original). That is because such agreements, like the delegation clause in Rent-A-Center's agreement, depart from typical understandings regarding the proper allocation of judicial and arbitral authority. "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

Rent-A-Center and its amici assert that, in determining whether there is a valid waiver agreement, "[t]he trial court's role . . . is . . . merely to determine whether the parties' contract expresses in clear and unmistakable *language* that the arbitrator will determine gateway issues of arbitrability." Pet. Br. 24 (emphasis added); *see also* Chamber Br. 12; Equal Employment Advisory Council Br. 9-11; Pacific Legal Foundation Br. 5. However, contract language alone will not be dispositive in many cases, and Nevada law is clear – as is contract law generally – that whether contracting parties have entered into a valid agreement to assign particular issues to an arbitrator or other third-party decisionmaker often requires inquiry that goes beyond the language of the agreement alone.

Under Nevada law, a court construing the meaning and intent of a particular contract clause must consider not only the disputed language but also other related contract provisions, *see, e.g.*, *Ringle v. Bruton*, 120 Nev. 82, 93 (2004); *Siggelkow*, 109 Nev. at 42; extrinsic evidence, such as the circumstances surrounding its adoption, *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215 (2007); and any relevant negotiating history, *see, e.g.*, *Clark County Pub. Employees Ass'n v. Pearson*, 106 Nev. 587, 597 (1990). This holistic approach to contract interpretation is entirely consistent with the black letter common law approach to contract clause interpretation. *See, e.g.*, *Restatement (Second) of Contracts* §202(2) (1981) ("A writing is interpreted as a whole . . . ."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("[A] document should be read to give effect to all its provisions and to render them consistent with each other."). Careful attention to all evidence of a contractual provision's meaning and the contracting parties' intent and understanding is particularly appropriate where, as here, the evidence of the parties' intention to submit the issue to arbitration must be "clear and unmistakable." Under Nevada law, a "clear and unmistakable" waiver requires the parties' "unconditional, voluntary, and absolute acquiescence" in the agreement, *Basic Refractories, Inc. v. Bright*, 286 P.2d 747, 749 (Nev. 1955) – a standard that an employer may be hard-pressed to establish in the context of a non-negotiable, adhesive, never-explained, far-from-intuitive contractual waiver of the right to have an independent judiciary decide threshold issues of enforceability.[4]

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[4] Under Nevada law, not only must the language in a contract be construed against the drafter, *see Anvui, LLC*, 123 Nev. at 216, but the courts must take into account the relative disparity in bargaining power between the contracting parties in determining the enforceability of the provisions of an adhesive form contract. *See Obstetrics*

This Court, as well, has recognized the extent to which the parties' negotiating history and course of conduct can trump seemingly "clear and unmistakable" language as an aid to ascertaining the contracting parties' intent and meaning, most recently in *14 Penn Plaza L.L.C. v. Pyett*, 129 S.Ct. 1456 (2009). In *Pyett*, the collective bargaining agreement included contract language that, on its face, "clearly and unmistakably" required individual bargaining unit members to submit to the collectively bargained grievance and arbitration forum any statutory claim those individuals

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& Gynecologists v Pepper, 101 Nev. 105, 107-08 (1985) (noting that non-negotiable, take-it-or-leave-it contracts entered into with weaker parties are enforceable only if they provide "plain and clear notification of the[ir] terms" and if those terms "fall[] within the reasonable expectations of the weaker . party"). In this case, Rent-A-Center presented its mandatory pre-dispute employment agreement to Jackson as a take-it-or-leave-it condition of his employment Jt. App. 41 Like many low-wage workers, Jackson had no meaningful choice in negotiating the terms of his employment contract, a practical consequence of the economic disparity in the workplace that Congress fully appreciated when it enacted the FAA in 1925, the heyday of the "yellow dog contract." *See, e g , Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration. Hearing on S 4213 and S. 4214 before a Subcomm of the Senate Comm. on the Judiciary*, 67th Cong , 4th Sess. 9 (1923) (Senator Walsh: "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all . . . . It is the same with a good many contracts of employment. A man says, 'There are our terms All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all."). Indeed, just six years after enacting the FAA, Congress in enacting the Norris-LaGuardia Act declared that "under prevailing economic conditions, . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . ." Norris-LaGuardia Act, ch. 90, §2, 47 Stat. 70 (1932), *codified at* 2f102.

might have under the ADEA. *Id.* at 1466. However, this Court did *not* find clear and unmistakable waiver, because the plaintiff and his amici (including the local union that negotiated the bargaining agreement) presented bargaining history showing that the meaning of that clause was the subject of legitimate dispute. *See id.* at 1473 (citing Resp. Br. 44-47); Resp. Br. at 46-47, *Pyett* (No. 07-581); SEIU Local 32BJ Br. at 9-14, *Pyett* (No. 07-581) (citing the drafting history that showed why the seemingly clear CBA language did not encompass such disputes); *see also Wright*, 525 U.S. at 81. Thus, this Court's case law as well supports the principle that, in determining whether a party has clearly and unmistakably agreed to delegate certain dispute resolution powers to an arbitrator, contract language is only the starting point for the judicial inquiry.

In addition to the requirement that any agreement to assign threshold enforceability issues to the arbitrator must be "clear and unmistakable" under relevant state law principles of contract interpretation, such an agreement, like any other contract, must also be legally valid and enforceable under state law. Accordingly, if a delegation clause is itself unconscionable or otherwise unenforceable under state contract law due to, for example, duress or fraud (or being illusory, as with mandatory arbitration agreements that give the employer unilateral power to change contract terms without notice, *see, e.g.*, *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002)), that clause cannot be enforced and the court, not the arbitrator, must retain full authority to resolve all threshold arbitrability issues. *See Doctor's Assocs., Inc.*, 517 U.S. at 687 ("unconscionability[] may be applied to invalidate arbitration agreements. . . ."); *Allied-Bruce Terminix Companies*, 513 U.S. at 281. Especially in the coercive context of non-negotiable, mandatory arbitration agreements imposed upon employees as a condition of their employment, delegation clauses like that in Rent-

A-Center's arbitration agreement must be carefully scrutinized for evidence of unconscionability, fraud, or duress.

Under applicable Nevada state contract law, there are several reasons why the district court on remand might conclude that the parties did *not* enter into an enforceable agreement to assign threshold issues of arbitrability to the arbitrator. *See* Resp. Br. 54-61. We address two of those reasons.[6]

B. The Delegation Clause May Be Unconscionable Under Nevada Law

On remand, the district court might first conclude that the delegation clause in Rent-A-Center's mandatory arbi-

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[6] Rent-A-Center admits that "the validity *vel non* of the agreement of the parties to assign unconscionability to the arbitrator" is properly before this Court, Pet Br 19 n.6, so this Court should consider all challenges to that agreement's validity – including its possible unconscionability. Jackson's challenge to the existence of a "clear and unmistakable" agreement is also properly before the Court for the reasons stated in Respondent's Brief at 55-57, as neither court below determined that the parties had entered into a valid, "clear and unmistakable" delegation agreement.

In any event, this Court may affirm the Ninth Circuit's decision on any ground supported by the record, *see Granfinanciera, S.A. v. Nordberg*, 492 U S 33, 38-39 (1989), and the exceptional circumstances here warrant consideration of these issues. In the courts below, Jackson reasonably relied upon this Court's prior decisions in concluding that enforceability issues cannot be delegated to an arbitrator. *See, e g., Awuah v. Coverall North America, Inc*, 554 F3d 7, 10-11 (1st Cir. 2009) (noting conflicting signals in this Court's prior decisions and stating that "[i]f the matter were completely open in this circuit, we are not certain of the outcome") Should the Court hold that threshold enforceability issues *may* be assigned to an arbitrator by the parties' clear and unmistakable agreement, Jackson should have an opportunity to demonstrate to the district court that no valid agreement exists in this case.

tration agreement is unenforceable because it is unconscionable under Nevada law.

Section 2 of the FAA requires the district court to apply Nevada unconscionability law in determining whether to enforce a delegation clause independently from the rest of the agreement. *See Doctor's Associates, Inc.*, 517 U.S. at 687; *Allied-Bruce Terminix Companies*, 513 U.S. at 281. "Generally," under Nevada law, "both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a . . . clause as unconscionable.'" *D.R. Horton*, 120 Nev. at 553 (quoting *Burch v. Dist. Ct.*, 118 Nev. 438, 442 (2002)). "However, less evidence of substantive unconscionability is required in cases involving great procedural unconscionability." *Id.* at 553-54 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000)). Under this "sliding scale" approach to unconscionability analysis, "'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) (en banc) (citing *Armendariz*, 24 Cal.4th at 114); *see also D.R. Horton*, 120 Nev. at 558 ("Although the one-sidedness of the provision is not overwhelming, it does establish substantive unconscionability, especially when considered in light of the great procedural unconscionability present in this case.").[6]

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[6] Because adhesive arbitration agreements are most common in the consumer and employment setting, they are more likely to be challenged as unconscionable in those circumstances, in contrast to cases where the contracting parties have comparable bargaining power. It is the adhesive nature of these agreements that enables the stronger party to take advantage of its relative strength by imposing oppressive or unreasonably one-sided terms upon the weaker party

The Nevada Supreme Court has largely incorporated California's approach to unconscionability, relying upon decisions of the California Supreme Court as well as Ninth Circuit decisions applying California law, especially in the context of non-negotiable form contracts imposed by a stronger party upon a party with little or no bargaining power. *See, e.g.*, *D.R. Horton*, 120 Nev. at 554 nn.12-13, 15 (citing *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002); and *Armendariz*, 24 Cal.4th 83). Accordingly, those California appellate decisions, although not binding, may still inform the district court's unconscionability analysis.

1. Procedural Unconscionability

Under Nevada law, "[a] clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." *D.R. Horton*, 120 Nev. at 554. Here, Jackson's challenge to the delegation clause would unquestionably satisfy this procedural unconscionability standard. That clause was included in a form arbitration agreement that Rent-A-Center presented to Jackson and required him to accept on a non-negotiable basis as a condition of his employment. Jt. App. 41. Jackson had no meaningful choice given the enormous disparity of bargaining power between him and his employer: "[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a

job because of an arbitration requirement." *Armendariz*, 24 Cal.4th at 115.

Like many employees, Jackson also lacked any meaningful opportunity to negotiate over, or even to become aware of the implication and reach of, the delegation clause, which was deeply buried within his employer's mandatory agreement and was neither highlighted nor explained to him. Rather than being prominently included in its own section with its own heading, or even within the "judicial review" section of the agreement where it logically would have appeared, that delegation language – without being identified as language of waiver – was presented in a single sentence tucked into the middle of the third paragraph of a seven-paragraph section that was generally entitled "Arbitration Procedures." Jt. App. 32-35. *Cf. D.R. Horton*, 120 Nev. at 555 (finding procedural unconscionability where the relevant provision was identified by a separate heading printed in capital letters but remained "inconspicuous").

Even if the delegation clause had been flagged by Jackson's supervisor at Rent-A-Center, the delegation language would still create procedural unconscionability concerns under Nevada law because the meaning and significance of that critically important clause were never explained – and the contract language is far from self-explanatory. Nowhere in that clause (or elsewhere in the agreement), for example, did Rent-A-Center specifically list unconscionability challenges as subject to determination by the arbitrator. Nor did Rent-A-Center explain to Jackson that, by accepting that clause, he was waiving his otherwise-available statutory right under the FAA to a judicial determination of all threshold questions of enforceability, no matter how much more appropriate they may be for a neutral court to decide than a potentially self-interested arbitrator. And, as explained below, the

"judicial review" clause of the arbitration agreement affirmatively *misled* Jackson as to the bottom-line consequences of the delegation clause – even if he understood its import – on his right to obtain de novo judicial review of any dispute concerning unconscionability. *Cf. Burch*, 118 Nev. at 443 (finding procedural unconscionability where plaintiffs were unsophisticated and did not understand the agreement's terms, and where relevant disclaimers were inconspicuous); *Gentry v. Super. Ct.*, 42 Cal.4th 443, 471 (2007) (finding procedural unconscionability based on the "highly distorted picture of the arbitration" offered under the arbitration agreement); *Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or.App. 553, 567-69 (2007) (finding procedural unconscionability where plaintiffs were misled as to the effect of the arbitration rider). These features of the delegation clause could lead the district court on remand to conclude that Jackson "lack[ed] a meaningful opportunity to agree to the clause terms" within the meaning of Nevada law. *D.R. Horton*, 120 Nev. at 554.

2. Substantive Unconscionability

Delegation clauses like Rent-A-Center's are also frequently oppressively one-sided in operation. Most notably, such clauses can prevent claimants from vindicating their rights by assigning to arbitrators various enforceability challenges that can only be resolved in a judicial forum. Accordingly, the district court might conclude on remand that the delegation clause in Rent-A-Center's mandatory arbitration agreement is also substantively unconscionable under Nevada law.

Substantive unconscionability under Nevada law (and contract law generally) "focuses on the one-sidedness of the contract terms," *D.R. Horton*, 120 Nev. at 554 (citations omitted), and on whether the terms of an agreement are unduly oppressive to one party, *see Burch*, 118 Nev. at

444; *see also Maxwell*, 184 Ariz. at 89 ("Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.") (citation omitted); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 12 (1988) (substantive unconscionability "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged"). Here, "[b]ecause the procedural unconscionability in this case is so great, less evidence of substantive unconscionability is required to establish unconscionability." *Burch*, 118 Nev. at 444.

Because the delegation clause encompasses all potential "enforceability" challenges, it necessarily encompasses unconscionability challenges that a designated arbitrator should never be permitted to decide, or for which the designated arbitration forum could not provide an adequate remedy. For example, this clause would require an employee bound by its mandatory provisions to challenge *in arbitration* a requirement that renders the arbitration procedure impossible to initiate or complete, or that makes arbitration so costly or inconvenient that the arbitration agreement is exculpatory in operation and thereby undermines the enforcement of all applicable statutory rights. *See, e.g., Engalla v. Permanente Med. Group, Inc.*, 15 Cal.4th 951, 975-76 (1997) (company's self-administered arbitration system was designed to create significant delays, including average delay of two years between demand for arbitration and appointment of neutral arbitrator); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 249, 254 (N.Y. App. Div. 1998) (requirement that consumers pay a $4,000 up-front fee, of which $2,000

was non-refundable, to arbitrate claims generally valued at less than $1,000); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (2001) (arbitration agreement required Virginia purchaser of used car to arbitrate warranty claims in Los Angeles); *cf.* C.A. App. 26, 29, 54, 74-79, *in EEOC v. Waffle House*, 534 U.S. 279 (2002) (No. 99-1823) (mandatory employment agreement incorporating AAA Commercial Arbitration Rules required short-order cook earning $5.50 per hour to pay $2,000 filing fee to initiate arbitration and to split ongoing daily forum and arbitrator fees in order to pursue ADA claim); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345-46 (8th Cir. 1985) (refusing to enforce forum selection clause requiring use of Iranian courts because "litigation of the dispute in the courts of Iran would . . . be so gravely difficult and inconvenient that McDonnell Douglas would for all practicable purposes be deprived of its day in court"). None of these challenges can be adequately remedied through arbitration: The basis for the challenge is that the challenged requirements stand as an actual impediment – or, at a minimum, a substantial chill – to arbitration.

Rent-A-Center's delegation clause also contains no exception for challenges based upon the personal and structural bias or self-interest of the arbitrator or arbitral forum, of which many examples exist. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (employer created list of potential arbitrators and was "free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management"); *Vedachalam v. Tata Am. Int'l Corp.*, 477 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (agreement required arbitration of California plaintiffs' statutory claims before two arbitrators of employer's choosing in Mumbai, India); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779, 783-85 (Ala. 2002) (agreement gave one party sole authority to appoint arbi-

trator); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) (agreement permitted "president of the Home Builder Association of Greater St. Louis" to choose arbitrator in dispute between home builder and home purchasers); *see also* Resp. Br. 52 & n.18 (noting allegations that National Arbitration Forum and debt collection firms that arbitrated thousands of cases before it were owned by the same entity).

"When the process used to select the arbitrator is fundamentally unfair, . . . the arbitral forum is not an effective substitute for a judicial forum. . . ." *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 n.7 (6th Cir. 2004). This Court has long recognized the serious issues of fairness and due process presented by a decisionmaker's conflicts of interest, *see, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 59-62 (1972), as well as the fact that such conflicts can only be addressed fairly through a procedure in which a non-involved decisionmaker determines whether disqualification is necessary – and sometimes not even then. *Id.* at 61 (citing Ohio Rev. Code Ann. §2937.20 (Supp. 1971)). The delegation clause here provides even less assurance of impartiality than existed in *Ward*, because this clause permits the arbitrator himself to determine whether bias prevents him from fairly presiding over the dispute between the parties. Indeed, just last Term, this Court recognized that where a decisionmaker must be the sole judge of his or her own bias, "there may be no adequate protection against a [decisionmaker] who simply misreads or misapprehends the real motives at work in deciding the [matter]." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2263 (2009) (finding due process violation where justice failed to recuse himself from appeal brought by primary contributor to judicial election campaign).

Rent-A-Center's delegation clause may also be challenged as substantively unconscionable because it forces

the arbitrator in many instances to expand or constrict his own jurisdiction as a consequence of striking or modifying a substantively unconscionable contract provision – an act that the arbitrator might perceive as beyond his authority. An arbitrator's powers are, of course, defined by and limited to the contractually authorized powers set forth in the arbitration agreement from which they are derived. *See, e.g.*, *AT&T*, 475 U.S. at 648-49 ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."). For the arbitrator in this case to require Rent-A-Center to arbitrate its currently carved-out trade-secret and non-competition claims (or, correspondingly, to limit which claims are *not* carved out), or to order different provisions regarding costs or discovery that the agreement does not contemplate; or for an arbitrator in a different case to strike a punitive damages provision,[7] invalidate a class action prohibition,[8] or expand a contractually shortened statute of limitations period (especially one that had already expired),[9] would

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[7] *Cf.*, *e.g.*, *Alexander v Anthony Int'l, L P*, 341 F 3d 256, 267-68 (3d Cir. 2003) (arbitration agreement limited damages to "net pecuniary damages"), *Graham Oil Co. v ARCO Products Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1994).

[8] *Cf.*, *e.g.*, *Dale v. Comcast Corp.*, 498 F.3d 1216, 1222-24 (11th Cir. 2007) (finding class action waiver unconscionable); *Discover Bank v. Super. Ct* , 36 Cal 4th 148, 162-63 (2005) (same).

[9] *Cf.*, *e.g.*, *Alexander*, 341 F3d at 266-67 (arbitration agreement required notification of claims within 30 days); *Nyulassy v. Lockheed Martin Corp.*, 120 Cal.App.4th 1267, 1283 (2004) (arbitration agreement shortened statute of limitations for some claims by more than three years); *cf. Pearson Dental Supplies, Inc v Super. Ct.*, 82 Cal.Rptr.3d 154, 158-59 (Cal. Ct. App. 2008), *petition for review granted*, 85 Cal Rptr.3d 693 (2008) (arbitrator dismissed claim as time-barred under terms of arbitration agreement without considering claimant's assertion that the time-bar in question was unconscionable).

arguably be to expand the arbitrator's jurisdiction beyond what the contract permits. *See, e.g.*, *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement. . . ."); *Carpenters Local 1027 v. Lee Lumber & Bldg. Material Corp.*, 2 F.3d 796, 798-99 (7th Cir. 1993) (upholding vacatur of arbitrator's decision holding union liable for back pay where agreement did not permit imposition of remedies against union). Nothing in Rent-A-Center's delegation clause or in any other section of its agreement provides the arbitrator with the authority to change the contract terms or to expand his contractually limited jurisdictional powers, even where such an expansion would be required by the state law of unconscionability. *Cf. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (explaining that, if the arbitrator's choice of remedy was "based solely upon the arbitrator's view of the requirements of enacted legislation . . . he exceeded the scope of the submission"). To that extent as well, the delegation clause is oppressive and could therefore be found substantively unconscionable by the district court on remand.

The delegation clause may also be challenged as substantively unconscionable under Nevada law on the separate ground that it is unduly one-sided. Rent-A-Center drafted the arbitration agreement and presented it to Jackson as a non-negotiable condition of his employment. Logic (and case law) suggest that Rent-A-Center itself will never be affected by the delegation clause, because the stronger party that drafted an adhesive form contract – here, Rent-A-Center – "cannot be expected to claim that it drafted an unconscionable agreement." *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal.App.4th 138, 145 (2007). By contrast, *all* of Jackson's potential enforceability challenges are covered by this clause, from

allegations of fraud or duress to the unconscionability challenges discussed in the previous paragraphs. Under Nevada law, "'parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope,'" but "'the doctrine of [substantive] unconscionability limits the extent to which a stronger party may impose the arbitration forum on the weaker party without accepting that forum for itself.'" *D.R. Horton*, 120 Nev. at 558 (quoting *Ting*, 319 F.3d at 1149) (alterations omitted).

Notably, both the Chamber of Commerce and the federal appellate courts recognize that at least *some* of the unconscionability challenges described above must be resolved by courts, not arbitrators.[10] The Chamber – mindful of this Court's warning that certain requirements in an arbitration agreement, including "the existence of large arbitration costs[,] could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) – acknowledges that pre-arbitration judicial review must at least be available to determine whether a plaintiff "effectively may vindicate his or her claims through arbitration." Chamber Br. 5 (citation omitted); *see also* Transcript of Oral Argument at 19-21, *Randolph*, 531 U.S. 79 (No. 99-1235) (colloquy between Chief Justice Rehnquist and attorney for Green Tree regarding need for pre-arbitration determination if costs are unconscionably excessive). The First Circuit in *Awuah*, 554 F.3d 7, similarly held that courts, before compelling arbitration, must at least determine "whether the arbitration regime . . . is structured so as to *prevent* a liti-

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[10] Accordingly, the question before the Court is simply *which* challenges to an arbitration agreement must be resolved by courts rather than arbitrators. The answer is necessarily provided by FAA §2 and its incorporation of state law principles of contract enforceability and validity.

gant from having access to the arbitrator to resolve claims . . . ." *Id.* at 13. Nonetheless, the delegation clause in Rent-A-Center's contract encompasses both of these challenges. Where a delegation clause in an adhesive contract, as in Rent-A-Center's agreement, does not by its own terms preserve the weaker party's access to a judicial forum to make *any* of these challenges, but instead funnels all enforceability challenges without limitation, restriction, or explanation to a designated arbitrator, that clause is sufficiently unconscionable that the district court, using Nevada's sliding scale approach, could find it legally unenforceable in its entirety.

For all these reasons, Rent-A-Center's delegation clause may be sufficiently one-sided and unfair in the context of this non-negotiable, pre-dispute mandatory arbitration agreement to be found unconscionable under Nevada law. *Cf. D.R. Horton*, 120 Nev. at 558 (arbitration agreement substantively unconscionable where only one party was required to pay liquidated damages for choosing to forego arbitration); *Burch*, 118 Nev. at 444 (arbitration agreement substantively unconscionable where agreement gave one party "unilateral and exclusive right to decide the rules that govern the arbitrators and to select the arbitrators"). That conclusion is particularly likely if the district court concludes, in applying Nevada law, that the Nevada Supreme Court would follow California law in deciding this issue (just as the Nevada Supreme Court has already followed *Armendariz* and *Ting*). *See supra* Part II.A. The California Courts of Appeal have already found that a delegation clause in an adhesive agreement that channels all disputes over enforceability to the designated arbitrator may be substantively unconscionable under the *Armendariz* line of cases. *See Ontiveros v. DHL Exp. (USA), Inc.*, 164 Cal.App.4th 494, 505 (2008), *cert. denied*, 129 S.Ct. 1048 (2009); *Murphy*, 156 Cal.App.4th at 145. Given the

Nevada Supreme Court's previous reliance upon California unconscionability law, these California decisions provide an additional reason why the district court on remand might determine that the delegation clause in this adhesive agreement is unconscionable and unenforceable under Nevada's general contract law.

C. The Delegation Clause May Be Unenforceable Because It Was Premised on a Mutual Mistake

The district court might also conclude on remand that the delegation clause is unenforceable because it is premised on the parties' mutual mistake regarding the availability of de novo judicial review.

As Jackson notes, the arbitration agreement between Jackson and Rent-A-Center includes two closely related provisions governing the courts' role in policing the fairness of the agreement's terms and ensuring the integrity of the adhesive arbitral process. Rather than eliminating de novo judicial review of Jackson's unconscionability claims altogether, the contracting parties sought to replace the usual *pre*-arbitration judicial review of unconscionability questions with unusual *post*-arbitration analysis of those questions under a de novo standard of review. Resp. Br. 59-61; *see also D.R. Horton*, 120 Nev. at 553 ("Whether, given the trial court's factual findings, a contractual provision is unconscionable is a question of law subject to de novo review."). However, this "time-shifting" approach to judicial review appears to be prohibited by the FAA. Resp. Br. 59. Thus, to the extent *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), holds that the FAA precludes de novo post-arbitration judicial review under the FAA of an arbitrator's legal conclusions, it necessarily follows that the parties to the Rent-A-Center agreement were mutually mistaken in their belief that they could contractually provide for de novo review of the arbitrator's unconscionability rulings.

Jackson explains why this mistake demonstrates the absence of a "clear and unmistakable" agreement to delegate threshold issues of unconscionability to the arbitrator. Resp. Br. 60-61. However, Nevada law provides another basis for equitable rescission or invalidation of the delegation clause here — mutual mistake. *See, e.g., Tarrant v. Monson*, 96 Nev. 844, 845 (1980). "Mutual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain." *Gramanz v. Gramanz*, 113 Nev. 1, 8 (1997). Here, the district court on remand might reasonably find such mutual mistake in the parties' mutual misunderstanding concerning their ability to contractually guarantee post-arbitration de novo judicial review of any arbitral ruling on unconscionability. *See Miller v. Thompson*, 40 Nev. 35, 160 P. 775, 780 (1916) (applying "mutual mistake" rule to parties' misunderstanding of their rights under federal law); *see also Tarrant*, 96 Nev. at 845 (citing *Miller*); *cf. Restatement (Second) of Contracts* §151 cmt. b (1981) (noting that modern law of mistake does not distinguish between mistakes of fact and mistakes of law). Given the dramatic departure from the parties' mutual intent, the district court reasonably might conclude that the parties' mutual misunderstanding is material to the enforceability of the initial delegation clause, and thus requires its rescission.[11]

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[11] Because an unconscionable arbitration agreement does not give rise to any valid duty to arbitrate and thus cannot confer upon the arbitrator any authority to resolve the parties' dispute, an arbitrator's conclusions regarding unconscionability *may* be subject to de novo judicial review under FAA §10(a)(4), which permits the courts to vacate an arbitration award where the arbitrators "exceeded their powers." 9 U.S.C. §10(a)(4). *See* Brief for Resp. Manuel Kaplan at *22, *in First Options*, 514 U.S. 938 (No. 94-560) ("Review of arbitrability under [FAA §§10(a)(4) and 11(b)] should be de novo."); *but see First Options*, 514 U.S. at 943 (suggesting, in dicta, that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration.") On remand, the district court should

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court affirm the circuit court's decision vacating the district court's order and remanding for further proceedings.

Respectfully submitted.
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be instructed to determine the extent to which de novo review of unconscionability remains available under §10(a)(4), as that determination may inform the court's resolution of the "mutual mistake" issue.